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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1546

MONTANA CONTRACTORS' ASSOCIATION, a Montana non-profit corporation; and LLOYD C. LOCKREM, INC., a Montana corporation, *Appellants,*

v.

THE SECRETARY OF COMMERCE OF THE UNITED STATES, THE MONTANA STATE DISTRICT OFFICER OF THE MONTANA ECONOMIC DEVELOPMENT ADMINISTRATION, and THE CITY OF KALISPELL, *Appellees.*

LLOYD C. LOCKREM, INC., a Montana corporation; *Appellant,*

v.

THE SECRETARY OF COMMERCE OF THE UNITED STATES, *et al, Appellees.*

On Appeal From the United States District Court for the District of Montana

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JURISDICTIONAL STATEMENT

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On Appeal From the United States District Court for the District of Montana

JURISDICTIONAL STATEMENT

Appellants Montana Contractors' Association, a chapter of Associated General Contractors of America,

Inc., and Lloyd C. Lockrem, Inc., appeal a portion of a judgment of the United States District Court for the District of Montana which found a federal statute unconstitutional but limited the relief granted to injunctive relief.

OPINION BELOW

The opinion of the United States District Court for the District of Montana, dated November 24, 1978, is reported at 460 F.Supp. 1174, and set forth herein as Appendix A. Its injunction issued on November 24, 1978, and its final judgment entered on January 10, 1979, are set forth herein as Appendices B & C respectively.

JURISDICTION

The opinion of the United States District Court for the District of Montana dated November 24, 1978, entered by the District Court on January 10, 1979, found Section 103(f)(2), the Minority Business Enterprise requirements (hereinafter MBE) of the Public Works Employment Act of 1977, 42 U.S.C. § 6705(f)(2), unconstitutional and permanently enjoined state and local defendants [hereinafter Appellees] from proceeding to make any grants or distribute any money to the City of Belt, Montana, which would require compliance with the MBE requirements, but denied Plaintiffs [hereinafter Appellants] any damages for infringement of their constitutional rights.

Notices of Appeal were filed in the United States District Court for the District of Montana by the federal defendant [hereinafter Appellee] and by the Montana Contractors Association and Lloyd C. Lockrem, Inc., on February 9, 1979. (A copy of the present Appellants' notice of appeal is set forth herein as Appendix J).

This Court has jurisdiction over this action under 28 U.S.C. § 1252 which allows a direct appeal to the Supreme Court in cases in which an Act of Congress has been found unconstitutional in a civil action to which the United States or any of its agencies or officers is a party.[1]

STATUTE INVOLVED

The provision of the statute involved in this appeal is Section 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. § 6705(f)(2). Section 103(f)(2) amends Section 106 of the Local Public Works Capital Development and Investment Act of 1976, 42 U.S.C. § 6705 and provides:

> "(2) Except to the extent that the Secretary determines otherwise, no grant shall be made under this chapter for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 percentum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term 'minority business enterprise' means a

[1] In *Associated General Contractors of California et al.* v. *Secretary of Commerce, et al,* No. 77-1078, the Plaintiffs appealed the District Court's decision which found Section 103(f)(2) of the Public Works Employment Act of 1977 unconstitutional but only granted prospective injunctive relief against enforcement of this statute. Thus, as that appeal involved the same Public Works Act as in the instant case, it would appear that by vacating the judgment of the federal district court judge and remanding the case to consider the issue of mootness, the District Court recognized its jurisdiction over the direct appeal under 28 U.S.C. § 1252.

business at least 50 per centum of which is owned by minority gorup members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts."

QUESTION PRESENTED

Where a District Court has declared that a federal statute violated Appellants' constitutional rights, did the District err in denying Appellants damages against local and federal appellees?

STATEMENT OF THE CASE

On July 22, 1976, the United States Congress enacted the Local Public Works Capital Development and Investment Act of 1976, 42 U.S.C. § 6701 *et seq.* (hereinafter the Public Works Employment Act of 1976). This Act provided $2,000,000,000 of federal funds to state and local entities for the purpose of alleviating national unemployment. On May 13, 1977, Congress enacted the Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116 (hereinafter PWEA), which amended the Public Works Employment Act of 1976. The 1977 Act contained an amendment, quoted in full above, which required at least a 10 percent set aside for minority business of the dollar value of each project. 42 U.S.C. § 6705(f)(2).

The Secretary of Commerce administers this Act through the Economic Development Administration which distributes program funds to state and local applicants for the construction of public works projects. Under Section 103(e)(1) of the PWEA, 42 U.S.C. § 6705 (e)(1), state and local grantees are required to

contract with private contractors for the construction of these public works projects. On May 27, 1977, the Secretary of Commerce issued regulations implementing the MBE provision of PWEA. 13 C.F.R. 317.19(b)(1977). These regulations provide:

> (1) No grant shall be made under this part for any project unless at least ten percent of the amount of such grant will be expended for contracts with and/or supplies from minority business enterprises.
>
> (2) The restriction contained in paragraph (1) of this subsection will not apply to any grant for which the Assistant Secretary makes a determination that the ten percent set-aside cannot be filled by minority businesses located within a reasonable trade area determined in relation to the nature of the services or supplies intended to be procured.

The MBE provisions of PWEA and its implementing regulations cited *supra* require that, in submitting his bid, a contractor must demonstrate that 10 percent of the dollar value of the bid would be done by minority businesses. While under PWEA, a grantee, e.g. state or local government may apply for a waiver of the 10 percent MBE requirement, (13 C.F.R. 317.19), there are no statutory nor regulatory provisions or guidelines by which a contractor may request such a waiver.

The City of White Sulphur Springs, Montana, was a grantee who received funds from the Economic Development Administration of the Department of Commerce under PWEA. On November 29, 1977, the City of White Sulphur Springs opened bids for a water system improvements project, EDA Project No. 05-51-20681. The City of White Sulphur Springs did not seek a waiver of the 10 percent MBE requirement for the project.

Appellant Lloyd C. Lockrem, Inc., made a bid of $168,130.86 for the water system improvements project at White Sulphur Springs. Appellant Lloyd C. Lockrem, Inc., was a low bidder on the project. However, Appellant Lloyd C. Lockrem, Inc., had been able to obtain minority contractors for only $5,000 of its bid, falling short of the 10 percent MBE requirement. Appellant sought a partial waiver of all but $5,000, but such partial waiver request was refused. Its bid was rejected as non-responsive because it did not meet the requirement that 10 percent of the contract be done by minority business enterprises. Appellant in computing its bid, estimated its gross profit to be 20 percent of the bid or $33,626.17. By having its bid rejected, it thereby was damaged in the sum of $33,626.17.

On December 6, 1977, Lloyd C. Lockrem, Inc., and other complainants filed a complaint, (Civil Action No. 77-153-BLG) (hereinafter Montana II) seeking declaratory relief that the MBE provision in PWEA violated Appellants' constitutional rights under the Fifth and Fourteenth Amendments. (A copy of the complaint is set forth herein as Appendix H). It also sought a temporary restraining order, preliminary injunction, and permanent injunction prohibiting local appellees from carrying out the White Sulphur Springs project and prohibiting federal appellees from withdrawing money from the project. The complaint also contained a prayer for damages against local appellees and a request for attorneys fees. On December 7, 1977, the District Court denied Appellant's request for a temporary restraining order.

On December 14, 1977, the Court consolidated this case with a case brought by Montana Contractors Association and Lloyd C. Lockrem, Inc., (Civil Action No. 77-62-M) (hereinafter Montana I), which challenged the constitutionality of the 10 percent MBE requirement in the PWEA and sought a declaratory judgment that Section 103(f)(2) of the PWEA, its implementing regulations and actions taken by local appellees to comply with the MBE provisions of the PWEA, violated Appellants' constitutional rights under the due process clause of the Fifth and Fourteenth Amendments. (A copy of the amended complaint filed by Appellants in Montana I is set forth herein as Appendix I). The Appellants also sought a temporary restraining order, preliminary injunction, and permanent injunction prohibiting the carrying out of the PWEA and enjoining the City of Kalispell, Montana, from awarding bids under the PWEA Act.[2] The complaint also contained a prayer for attorney fees and other additional relief that is just and equitable.

At a hearing on August 11, 1978, the Court denied Appellant Lloyd S. Lockrem, Inc.'s, request for damages against local appellees in Montana II and also denied Appellant's request for a preliminary injunction in the same case. (A copy of the transcript of this hearing is set forth herein as Appendix G). Appellant moved to amend its complaint in Montana II to seek damages from the federal appellees. (A copy of this Motion and accompanying Memorandum is set forth herein as Appendices E & F respectively). In its order of October 4, 1978, the District Court denied Appel-

[2] This case involved the awarding of bids by the City of Kalispell, Montana, a grantee of funds under PWEA for EDA Project No. 05-51-20682. The District Court, on October 18, 1977, issued a temporary restraining order in this case, which was extended by the parties until October 31, 1977. On November 7, 1977, the District Court denied Appellants' request for a preliminary injunction.

lant's Motion to Amend its complaint. (A copy of this order is set forth herein as Appendix D). The Court also denied Appellants' request for partial summary judgment in each of the consolidated cases on October 4, 1978.

On August 11, 1978, Appellants, in Montana I, moved for an interlocutory injunction against enforcement of the MBE provision of the PWEA with respect to EDA Project No. 05-51-20667, a sewer project, Phase II for the City of Belt, Montana, which had to be rebuilt as the result of a default on the project. On October 4, 1978, the District Court issued an order denying without prejudice Appellants' request for injunctive relief with regard to the Belt project, Phase II. (Appendix D.) The Court granted Appellants the right to refile its Motion for Injunction if it appeared that the Belt project would be relet before the consolidated cases could be tried on the merits. On October 26, 1978, the City of Belt scheduled bids to be opened on the Belt project, Phase II. Appellants thereupon renewed their requests for an interlocutory injunction, which the District Court granted on October 27, 1978.

A trial on the merits was held on October 30, 1978. On November 24, 1978, the District Court issued its decision in the consolidated cases finding Section 103 (f)(2) of the PWEA unconstitutional and granted a permanent injunction enjoining federal and state defendants from requiring the City of Belt to comply with Section 103(f)(2) of the PWEA. On January 10, 1979, the District Court entered a final judgment which denied all relief claimed by Appellants in the consolidated cases, except for the permanent injunctive relief granted in the District Court's order of November 24, 1978.

REASONS FOR NOTING PROBABLE JURISDICTION

I. Appellants Are Entitled to Damages Against Federal and Local Appellees for Violation of Their Constitutional Rights

The substantial question presented in this case is the right of Appellants to damages against federal and local Appellees where the District Court has held that a federal statute is unconstitutional and violated their constitutional rights. In the instant case, Appellant Lloyd C. Lockrem, Inc., brought a suit challenging the MBE provision of the PWEA on the grounds that it violated the Fifth Amendment and the Fourteenth Amendment. In its original complaint, it sought damages against local Appellees. Later it sought to amend its complaint to seek damages against the federal Appellees. The District Court refused to consider Appellant's right to damages against local Appellees and refused to allow Appellant to amend its complaint to seek damages against federal Appellees on the basis that no right to damages existed.

Under 42 U.S.C. § 1983, a plaintiff may recover damages for a constitutional violation committed by state and local officials. *Monell* v. *Department of Social Services,* 436 U.S. 658 (1978). In the circumstances of this case where the District Court found that Appellant's constitutional rights had been violated, Appellant should have been awarded damages. Thus, the District Court erred in its refusal to consider damages against local Appellees who enforced Section 103(f)(2) of the PWEA in the awarding of bids for the water system improvements public works project at White Sulphur Springs, Montana.

This Court in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971),

held that a plaintiff may bring a damage action for violation of the Fourth Amendment by federal officials. Since *Bivens,* most lower federal courts have recognized the right of a plaintiff to seek damages for violation of other constitutional rights. *See cases cited in Davis* v. *Passman,* 571 F.2d 798, 807 n.6 (5th Cir. 1978) (en banc) (Goldberg, J. dissenting), *cert. granted,* 99 S.Ct. 308 (1978) (No. 78-5072).[3] Specifically, nine United States Courts of Appeals have extended *Bivens* beyond the Fourth Amendment to cover violations of the Fifth and Fourteenth Amendments.[4]

Further, in *Butz* v. *Economou,* 98 S.Ct. 2894 (1978), this Court indicated that the existence of a constitutional damage action extends beyond violations under the Fourth Amendment. In *Butz* v. *Economou, supra* at 2906, this Court noted the standard used for determining damages against state officials for constitutional violations, *citing Wood* v. *Strickland,* 420 U.S. 308 (1975) and other cases dealing with this issue. The standard as set forth in *Wood* v. *Strickland, supra* was whether the official:

[3] The decision in *Bivens* was by a split vote. However, the dissent appeared to focus on the tort nature of the subject matter of the litigation and probably would not have reached the same results in a civil rights case as in the instant litigation.

[4] *Payne* v. *Government of District of Columbia,* 559 F.2d 809 (D.C. Cir. 1977); *Gentile* v. *Wilson,* 562 F.2d 193 (2d Cir. 1977); *U. S. ex. rel. Moore* v. *Koelzer,* 457 F.2d 892 (3d Cir. 1972); *Gagliardi* v. *Flint,* 564 F.2d 112 (3d Cir. 1977); *Loe* v. *Armistead,* 582 F.2d 1291 (4th Cir. 1978); *Cox* v. *Stanton,* 529 F.2d 47 (4th Cir. 1975); *Yiamouyiannis* v. *Chemical Abstracts Service,* 521 F.2d 1392 (6th Cir. 1975); *Fitzgerald* v. *Porter Memorial Hospital,* 523 F.2d 716 (7th Cir. 1975); *Owen* v. *City of Independence,* 560 F.2d 925 (8th Cir. 1977); *Jacobson* v. *Tahoe Regional Planning Agency,* 558 F.2d 928 (9th Cir. 1977); *Dry Creek Lodge, Inc.* v. *United States,* 515 F.2d 926 (10th Cir. 1975).

> "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intent to cause a deprivation of constitutional rights or other injury to the student."
>
> *Id.* at 322.

The facts in Montana II documented that Lloyd C. Lockrem, Inc., would meet the standard for obtaining damages for constitutional violations set forth in *Wood* v. *Strickland, supra.* The complaint of Lloyd C. Lockrem, Inc., documents that Appellant was the low bidder for the White Sulphur Springs public works project funded under the PWEA, Appendix H at 25a. In its affidavit, Lloyd C. Lochrem, Jr. described his efforts to comply with the requirements of PWEA, his application for waiver and its denial. Appellant alleges in his complaint the lost profits suffered as a result of being denied the contract for the White Sulphur Springs project. Appendix H at 39a. The federal Appellees, by insisting upon the requirements of the MBE quota at a time when it clearly could not be met was acting arbitrarily and its action, could be deemed to meet the standards noted in *Butz* v. *Economou* for the award of damages.[5] The District Court's refusal to allow Appellant to amend its complaint where Appel-

[5] This Court can take judicial notice that there were extensive discussions by Appellees of the constitutionality of this provision.

lants sought to recover for a constitutional violation constituted an abuse of discretion.[6]

As noted, *supra*, the present litigation is a consolidation of two separate complaints. While Appellants in Montana I did not explicitly ask for damages, it requested "such other additional relief as is just and equitable." *Cf. Mitchell American Tobacco Co.*, 28 F.R.D. 315 (D. Pa. 1961). This language can be considered as the basis of an award of damages. In *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), this Court recognized that Appellants in civil rights cases are normally entitled to damages upon establishment of their claim. Inasmuch as the District Court had refused to consider monetary damages against local or federal Appellees in Montana II, it would have been a futile act for Appellant Montana Contractors Association to explicitly request such damages other than that contained in the prayer for relief in Montana I. Thus, this Court should consider the issue of damages with respect to Appellants in both Montana I and Montana II.

CONCLUSION

In sum, when the District Court found that the MBE provision of the PWEA denied Appellants equal protection which is guaranteed under the Fifth and Fourteenth Amendments, it erred in denying damages

[6] It is a well established legal principle that amendments to pleadings are to be freely made. *Zenith Radio Corp.* v. *Hazelline Research, Inc.*, 401 U.S. 321 (1971). There is clear authority for the proposition that a federal damage claim may be brought for a violation of the Fifth and Fourteenth Amendments. Further, Appellant Lockrem had made factual allegations of damage in his complaint.

to Appellants against federal and local Appellees.[7] For the foregoing reasons, we submit that the court should note probable jurisdiction in this case.

Respectfully submitted,

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[7] Appellants also should have been granted attorneys fees for violation of their constitutional rights.

APPENDIX

APPENDIX A

MONTANA CONTRACTORS' ASSOCIATION et al., *Plaintiffs,*

and

Donna Higgins, d/b/a Higgins & Co., *Intervenor,*

v.

The SECRETARY OF COMMERCE et al., *Defendants.*

LLOYD C. LOCKREM, INC., et al., *Plaintiffs,*

v.

The SECRETARY OF COMMERCE et al., *Defendants.*

Nos. CV 77-62-M, CV 77-153 BLG.

United States District Court,
D. Montana,
Missoula and Billings Divisions.

November 24, 1978

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Robert T. O'Leary, Butte, Mont., Glen Neier, White Sulphur Springs, Mont., Gerald Hartman, Dept. of Justice, Employment Sec., Civil Rights Division, Washington, D.C., for defendants.

Murray, Donahue & Kaufman, Kalispell, Mont., for City of Kalispell.

Opinion

RUSSELL E. SMITH, Chief Judge.

This case was brought to test the constitutionality of the Minority Business Enterprise (MBE) requirement of the Public Works Employment Act of 1977, Section 103(f)(2)

of Pub.L. No. 95-28, 91 Stat. 116, 42 U.S.C. § 6705(f)(2), which provides:

Except to the extent that the Secretary determines otherwise, no grant shall be made under this chapter for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority busniess enterprises. For purposes of this paragraph, the term "minority business enterprise" means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.

The Act itself uses the words "Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts" without definition. In this case the problem of definition is different and more important than in other cases dealing with affirmative action.[1] In those cases the discriminating actor defines the race as to which relief should be granted by his act of discrimination, and when the remedy is fashioned, it necessarily is tailored to correct the actual injustice done. Thus, in the case of *Carter v. Gallagher*, 452 F.2d 315, *modified on rehearing en banc*, 452 F.2d 327 (8th Cir. 1972), had it

[1] *See, e. g., Franks v. Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976); *Associated General Contractors of Massachusetts, Inc. v. Altshuler*, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957, 94 S.Ct. 1971, 40 L.Ed.2d 307 (1974); *Bridgeport Guardians, Inc.* v. *Civil Service Commission*, 482 F.2d 1333 (2d Cir. 1973); *Carter v. Gallagher*, 452 F.2d 315, *modified on rehearing en banc*, 452 F.2d 327 (8th Cir. 1972). These cases were cited by Justice Powell in *Regents of the University of California v. Bakke*, —— U.S. ——, 98 S.Ct. 2733, 57 L.Ed. 2d 750 (1978).

been necessary to define an Indian or a Black to determine who should be counted as a member of the quota established (which it apparently was not) the court could have looked at the actual discrimination being rectified and treated as Blacks or Indians the same kind of people that the defendants had treated as Blacks or Indians.

Under the guidelines adopted by the Economic Development Administration,[2] almost any degree of minority blood is sufficient, but as to Indians an extra requirement was added, as follows: "Indian—an individual having origins in any of the original people of North America and who is recognized as an Indian by either a tribe, tribal organization or a suitable authority in the community. (A suitable authority in the community may be: educational institutions, religious organizations, or state agencies.)" It is noted that the recognition comes not from Congress,[3] not from an authorized administrative agency, but from a tribe, church, educational institution, or state agency.

Because almost anybody with any degree of minority blood may be in the class favored by the MBE requirement, I conclude that the law does not conform to the standards set by *Regents of the University of California v. Bakke*, —— U.S. ——, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978).

Nonminority contractors do not have a right to participate equally in the bidding for public contracts, and when they do participate with minority enterprises or subcontractors, they are required to give a preferential treat-

[2] EDA Minority Business Enterprise Technical Bulletin of October 11, 1977.

[3] Congress has on occasion taken care to define the word "Indian." *See* 25 U.S.C. § 1603(c).

ment to them, which they would not be required to give to nonminority subcontractors.[4] The law does discriminate against them .

[1, 2] I think that Justice Powell's opinion in *Bakke* stands for this: The equal protection concept embraced in the fifth amendment forbids racial discrimination. Where

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[4] For example, the guidelines provide:

> An MBE is qualified if it can perform the services or supply the materials that are needed. Grantees and prime contractors will be expected to use MBE's with less experience than available nonminority enterprises and should expect to provide technical assistance to MBE's as needed. Inability to obtain bonding will ordinarily not disqualify an MBE. Grantees and prime contractors are expected to help MBE's obtain bonding, to include MBE's in any overall bond or to waive bonding where feasible. The Small Business Administration (SBA) is prepared to provide a 90% guarantee for the bond of any MBE participating in an LPW project. Lack of working capital will not ordinarily disqualify, an MBE. SBA is prepared to provide working capital assistance to any MBE participating in an LPW project. Grantees and prime contractors are expected to assist MBE's in obtaining working capital through SBA or otherwise.

and

> Only the Grantee can request a waiver. Ordinarily a waiver request will be considered only after the Grantee and its prime contractors have taken every feasible action to achieve at least 10% MBE participation. For example, if the Grantee or its prime contractors have taken all feasible steps to locate relevant MBE's and have requested all available qualified MBE's to participate as contractors, subcontractors or suppliers and not enough MBE's can or will participate to reach the 10% MBE participation goal, a waiver request detailing the efforts of the Grantee and its prime contractor may be necessary in order for the project to proceed. Such a waiver request would ordinarily be made after the initial bidding or negotiation procedures proved unsuccessful.

Guidelines for 10% Minority Business Participation in LPW Grants, pp. 3-4, 14-15.

a law on its face is racially discriminatory, it must be subjected to the most rigid scrutiny. Thus, Justice Powell quoted from *Hirabayashi v. United States,* 320 U.S. 81, 100, 63 S.Ct. 1375, 1385, 87 L.Ed. 1774 (1943), as follows: "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality," and from *Korematsu v. United States,* 323 U.S. 214, 216, 65 S.Ct. 193, 194, 89 L.Ed. 194 (1944) as follows: ". . . [A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny."[5]

[3] Preferences may be justified to serve a compelling public need, but when that need is determined, the remedy must be precisely tailored to fit it. Where a group is selected for special treatment, the public interest justifying

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[5] It is urged that the doctrine of strict scrutiny should not apply to American Indians because of their unique relationship with the United States. Although Justice Powell said, "It is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others," there was no special Indian policy involved in *Bakke* because Indians had not been admitted to the medical school at Davis and because the Court was examining the relationship between minorities and a medical school, not the relationship between minorities and the United States Congress. I think that the "guardian-ward" relationship has existed between the United States and Indians and that that relationship could justify differences in treatment. There is, however, no indication here that the Congress was acting in furtherance of a governmental policy directed to Indians as "wards" or that the definition of the term "Indian" would be what it is here if Congress had been acting in furtherance of the role of a "guardian." In the scrutiny of a law dealing with Indians, the unique history of the Indian must be recognized as a factor, but in my opinion the scrutiny must be strict.

that selection should be based on some factors common to the members of that group. If previous discrimination is one of the factors justifying a selection, then, generally speaking, the inclusion of members in the group who have not been the victims of discrimination would not serve the public interest. By the same token, if to remedy the damage done or to promote racial equality a law is enacted which includes individuals upon whom those factors have not operated, then the remedy has not been precisely tailored.

[4] I am able to find a public need to remedy the effects of past discrimination, and I judicially note that minority races have been the victims of discrimination. Were a law enacted for the purpose of carrying out some "guardian-ward" policy of the federal government, I could find a need if the law were restricted to "wards." *Bakke,* however, in my opinion, forbids the use of a general societal discrimination to justify a scheme which seeks to insure that in any given facet of public life the percentages of races are proportionate. If such is not permitted, then I conclude that the remedy here is not precisely tailored to serve the compelling public interest.

[5] Because racial and ethnic distinctions of any sort are inherently suspect and call for the most exacting judicial examination, I think it necessary that the justification for this law appear by legislative, administrative, or judicial findings. *See Bakke* at —— U.S. ——, 98 S.Ct. 2733, 57 L.Ed. 750. If it be assured that the debates on the floor of the House and reports of government agencies not made in connection with the MBE requirement (which was added by amendment on the floor of the House) are findings,[6]

[6] The decisions in the cases of ***Fullilove v. Kreps,*** 584 F.2d 600 (1978), and ***Associated General Contractors v. Kreps,*** No. F78-1 (D.Alas. Oct. 5, 1978), treat the remarks of the proponents of the MBE amendment on the floor of the House and a report of the House Subcommittee on Small Business Administration as legislative findings. I note these decisions only to express my disagreement with them. I have no doubt that debate may be taken as evidence of the intent of Congress for, after all, intent is a state of mind, and what is said tends to reveal what is in the mind. However, to take the words of a partisan in one house and to assume that the passage of a bill on which the partisan spoke constituted an adoption of those words by both houses and an implied finding that they were true by two houses is to assume more than I am able to assume.

I am unable to accept the House Subcommittee Report on Small Business Administration Oversight and Minority Business Enterprise as a congressional finding. The Report was not made in conjunction with the MBE amendment, and to conclude that a majority of the members of Congress read it and by passage of the amendment adopted it is more than I am able to conclude.

they do no more than find that the minority races do not participate in equal proportion in government bidding, and state the conclusion that this is because of discrimination. They make no distinction between races, and there are no findings justifying an all-inclusive preference for all members of a race regardless of the degree of dilution of blood or any past history.[7]

I judicially note that there has been some integration of all races in this country and that there are vast differences between the cultural and economic levels of the individuals of each race. I am not able to notice that the needs of the Japanese in Hawaii are the same as those of the Japanese in California or that the needs of the Indians in New York are the same as those of the Indians in Montana. I speak largely of the Indians in Montana because of what I may judicially note to be true in Montana and because of what

[7] The only finding which relates in any way to a specific race is found in H.R. Rep. No. 95-20, 95th Cong., 1st Sess., *reprinted in* [1977] U.S. Code Cong. & Admin. News, pp. 150, 152, which noted the extremely high unemployment rate on Western Indian reservations as an explanation of the 2½ percent of the appropriations which was set aside for grants for Indian reservations.

the record in this case tells me.[8] The court judicially notes that many tribal members with small fractions of Indian blood have moved from the reservations and into the mainstream of Montana life. These people are indistinguishable in name, skin color, dress, and use of language from their non-Indian neighbors. It is likely that such integration in Montana is less than in those Eastern states where Indians and non-Indians have been living close to each other for a much longer time and in those states where there have been no reservations to foster racial separateness. The court judicially notes that in some Montana tribes one-eighth Indian blood qualifies a person for tribal membership.

The record here proves what is judicially noted. Thus, among the people qualified to bid on EDA projects who were called as witnesses were Walter Fouty, who is one-eighth Confederated Salish and Kootenai; William L. Kelly, who is one-fourth Crow; Ronald Paul, who is 15/32 Blackfeet; and Raymond Wetzel, who is one-fourth Cree-Chippewa. The three first named were tribal members while Wetzel was designated as an Indian by the Montana State Highway Commission. Of the four, one has had post high school vocational and college training and is a member of a family which has been contracting in the logging business for 25 years. Another has been in military service, has worked as an apprentice and as a journeyman electrician; he has worked on the North Slope in Alaska with a salary of some $40,000.00 per year, and in Iran as an assistant

[8] There are no black minority business enterprises in the state. The witnesses who appeared as minority business entrepreneurs were all American Indian. Except for one brief reference to a Spanish-speaking contractor, all of the evidence concerns minority business enterprises controlled by Indians. I judicially note the fact that American Indians comprise 3.8 percent of the population in Montana and are the largest minority group, there being about 26,000 Indians as compared with 3,000 members of other minority groups, including Negroes.

superintendent. Another has been an apprentice and a journeyman floor coverer working for non-Indian employers. Another has been in the construction business most of his life and was in his father's business on the West coast for some time. He has a net worth of $800,000.00. Of the four, only one could be readily identified as a person with any Indian heritage; he was the one who had lived on the West coast. There was no evidence that any of these persons had been victims of discrimination. The MBE provision had helped them enter the contracting business, but the difficulties which they had experienced in becoming successful competitive bidders were those which any nonminority member could experience—that is, lack of capital, lack of bonding capacity, and, perhaps most important, lack of a "track record" demonstrating reliability and capability.

It may be that the number of persons bearing any degree of Indian blood who could be certified by some tribe or agency as Indian, who are in fact fully integrated into a non-Indian society, is minimal and unimportant in the overall view; it may be that the United States cannot raise the economic level of those Indians who need help without preferring all with any degree of Indian blood; it may be that, if persons with some degree of Indian blood are given government contracts, they will in turn give employment to other Indians by contract or otherwise and thus improve the general economic status of the Indian. It may be that these or other reasons would justify the Act under consideration, but there are no administrative or congressional findings, and in the face of the record, I am unable to find that the law here has been precisely tailored to serve a compelling public interest.

The things I judicially note and the facts shown in the record here prevent me from finding what I would be required to find to sustain this Act as to Indians. Likewise, I am unable to make the necessary positive findings as to other races here and in other places. I do find that the

law denies equal protection to the plaintiffs and intervenor here, and is for that reason unconstitutional.

[6] By reason of the fact that the grant to Belt, Montana, has been made, but that no contract is let, and the grant has not been fully distributed, the action is not moot.

This opinion constitutes the findings of fact and conclusions of law of the court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

No. CV-77-62-M

MONTANA CONTRACTORS' ASSOCIATION, a Montana non-profit corporation; and LLOYD C. LOCKREM, INC., a Montana corporation, Plaintiff,

and

DONNA HIGGINS, d/b/a HIGGINS & Co., Plaintiff-Intervenor,

-VS-

THE SECRETARY OF COMMERCE OF THE UNITED STATES, THE MONTANA STATE DISTRICT OFFICER OF THE MONTANA ECONOMIC DEVELOPMENT ADMINISTRATION, and THE CITY OF KALISPELL, Defendants.

No. CV-77-153-BLG

LLOYD C. LOCKREM, INC., a Montana corporation; LEN F. BLANCHER; JERRY L. PURDON; and WATERWORKS SUPPLIERS Co., a corporation, Plaintiffs,

-VS-

THE SECRETARY OF COMMERCE OF THE UNITED STATES; THE MONTANA STATE DISTRICT OFFICER OF THE MONTANA ECONOMIC DEVELOPMENT ADMINISTRATION; THE CITY OF WHITE SULPHUR SPRINGS, MONTANA; NETTA MAE BINNIE, TOM COBURN, EDWARD ROATCH, and ROBERT BORLAND, members of the City Council of White Sulphur Springs, Montana; and KENNETH BALLANTYNE, Mayor of White Sulphur Springs, Montana, Defendants.

Injunction

In accordance with the court's opinion of this date,

IT IS NOW ORDERED that the defendants The Secretary of Commerce of the United States and The Montana State District Officer of the Economic Development Administration are hereby enjoined from proceeding to make any grants or disburse any money to the City of Belt, Montana, under any orders, directives, or guidelines requiring a compliance by the City of Belt with the Minority Business Enterprise (MBE) Amendment to the Public Works Employment Act of 1977 (42 U.S.C. § 6705(f)(2)).

Said defendants are further ordered and directed to proceed with the EDA grant to the City of Belt; to direct the City of Belt to call for additional bids; and to award the contract to a bidder who qualifies under law, whether in compliance with the MBE Amendment to the Public Works Employment Act of 1977 (42 U.S.C. § 6705(f)(2)), or any rules, regulations, or guidelines adopted pursuant thereto, or not.

It is the intention of this order that no bid shall be disqualified by reason of any compliance with the MBE requirement but that no bid shall be preferred because of such compliance and that the contract be awarded without reference to compliance or noncompliance with such requirement.

DATED this 24th day of November 1978.

/s/ RUSSELL E. SMITH
Russell E. Smith
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

CV 77-62-M

CV 77-153-BLG

[title omitted in printing]

Judgment

Except for the injunctive relief granted by the court's order of November 24, 1978, all relief claimed by the plaintiffs and intervenor in these consolidated cases is denied.

The injunctive order of November 24, 1978, remains in full force and effect.

DATED this 10th day of January 1979.

/s/ RUSSELL E. SMITH
Russell E. Smith
United States District Judge

Entered Jan. 10, 1978

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

CV 77-62-M

CV 77-153-BLG

[title omitted in printing]

Order

Federal defendants' motion for leave to file out of time is granted.

Plaintiffs' motion for leave to file an amended complaint in Cause No. CV 77-153-BLG is denied. Allowing the amendment would be an idle move because the claim stated in the proposed amendment would be subject to a motion to dismiss if filed.[1] *Butz v. Economu,* 46 U.S.L.W. 4952 (June 29, 1978).

Plaintiffs' motion for injunctive relief is denied without prejudice to refile if it appears that the Belt project will be relet before these cases can be tred on the merits.

Plaintiffs' motion for partial summary judgment is denied.

Defendants' motion for a hearing is granted. These cases are hereby set for trial on the merits on the Missoula trial calendar of October 16, 1978. On that date, the cases will be assigned a definite trial date.

DATED this 4th day of October 1978.

RUSSELL E. SMITH
Russell E. Smith
United States District Judge

[1] *See* Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Cullinary Workers, 542 P.2d 1076, 1085 (9th Cir. 1976) (citing 3 Moore's Fed. Prac. ¶ 15.08(d).

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

No. CV-77-62-M

No. CV-77-153-BLG

[title omitted in printing]

Motion to Amend Complaint in Cause No. CV-77-153-BLG

COMES Now Lloyd C. Lockrem, Inc., one of the Plaintiffs in the above-entitled action, and respectfully moves to amend the complaint on file by adding the following allegations:

1. That Plaintiff Lockrem, prior to submitting its bid on the project, attempted to comply with the MBE requirement and exercised extensive good faith efforts in attempting to comply with that provision but was unable to submit a bid in compliance with the requirement without:

(a) Discriminating against non-minority business enterprices purely on the basis of race;

(b) Creating the risk (because of higher MBE quotations) of being unable to submit the lowest bid; and/or

(c) Was unable to find any qualified MBEs who were willing, ready, and able to perform the required work or supply needed materials.

2. That Lockrem applied directly to the EDA officials in Denver for waiver of the MBE requirement; that Lockrem was advised by the project engineer and city officials of its inability to comply with the MBE requirements and in turn requested the local officials to request the EDA for a waiver of the MBE requirement.

3. That the EDA official summarily denied Lockrem's request for a waiver of the MBE requirement both directly and indirectly through city officials and, in doing so, acted arbitrarily, unreasonably, and unjustifiably and in so doing, violated Lockrem's constitutional rights. That Reginal Gant participated in the decision-making process which resulted in the waiver being denied and was the federal executive personnel who unreasonably, unjustifiably, and arbitrarily deprived Lockrem of its constitutional rights, as a result of which, Reginal Gant is directly liable to Lockrem for the damages sustained by Lockrem as a result of its bid being rejected as non-responsive, although Lockrem was low bidder, and thus prevented Plaintiff Lockrem from earning a profit in the reasonable and expected amount of Thirty-three Thousand Six Hundred Twenty-six and 17/100 ($33,626.17) Dollars.

4. That the liability of the federal EDA official is predicated upon the recent Supreme Court case of *Butz, et al.* v. *Economou, et al.*, decided June 29, 1978, 46 L.W. 4952.

DATED this 24th day of August, 1978.

POORE, MCKENZIE, ROTH,
ROBISCHON & ROBINSON, P.C.

By /s/ James P. Harrington
Attorneys for the Plaintiffs
Suite 400, Silver Bow Block
Butte, Montana 59701

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

No. CV-77-62-M

No. CV-77-153-BLG

[title omitted in printing]

Memorandum in Support of Motion to Amend Complaint in Cause No. CV-77-153-BLG

Subsequent to the filing of the complaint in the above-entitled action, the Supreme Court of the United States decided *Butz, et al.* v. *Economou, et al.*, June 29, 1978, 46 L.W. 4952, in which the Supreme Court held that federal executive officials who unreasonably deprived individuals of their constitutional rights were personally liable in damages. The Federal Defendant, Reginal Gant, arbitrarily, unreasonably, and unjustifiably refused to grant a waiver to the City of White Sulphur Springs and its low bidder, Lockrem, although the facts and circumstances clearly provided the basis upon which a waiver of the MBE requirement should have been granted. The acts of the Federal Defendant fail to bring him within the qualified immunity articulated in *Butz*, and, therefore, the Plaintiff should be entitled to recover damages from the named Federal Defendant, Reginal Gant, on the basis of *Butz*.

At the very least, a factual issue is presented, and the Plaintiff should be entitled to present its evidence in support of the allegations of the complaint addressing the question of damages which are recoverable from Federal Defendant.

Under Rule 15, F.R.Civ.P., amendments to the pleadings should be liberally granted. Since a federal rule of damages under Section 1983 had not been finally articulated

prior to *Butz,* it is respectfully submitted the motion is timely made, and, under all the facts and circumstances of this case, a factual question is presented which should be presented upon appropriate proof to the court for decision.

RESPECTFULLY SUBMITTED this 24th day of August, 1978.

POORE, MCKENZIE, ROTH,
ROBISCHON & ROBINSON, P.C.

By /s/ James P. Harrington
Attorneys for the Plaintiffs
Suite 400, Silver Bow Block
Butte, Montana 59701

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

Civil No. 77-62-M

Civil No. 77-153-BLGS

[title omitted in printing]

Transcript of Proceedings, (Pgs. 3-4)

Reported by Carroll B. Copeland, C.S.R., R.P.R., Official-Freelance Court Reporter and Notary Public, State of Montana, Residing in Missoula, Montana.

Taken in the United States Court House
Missoula, Montana
Friday, August 11, 1978—1:30 P.M.

APPEARANCES

URBAN ROTH, ESQ. and JAMES HARRINGTON, ESQ., of the firm Poore, McKenzie, Roth, Robischon & Robinson, Esqs., 400 Silver Bow Block, Butte, Montana,

appearing on behalf of Montana Contractors Association and Donna Higgins.

GLEN NEIER, ESQ., County Attorney, P.O. Box 574, White Sulphur Springs, Montana,

appearing on behalf of Defendant City of White Sulphur Springs.

NORBERT DONAHUE, Esq., of the firm Murray, Donahue & Kaufman, Esqs., Box 899, Kalispell, Montana,

appearing on behalf of Defendant City of Kalispell.

RICHARD UGELOW, ESQ., Civil Rights Division, U.S. Department of Justice, Washington, D.C., 20530,

appearing on behalf of Defendant Secretary of Commerce and Montana Office of EDA.

FRIDAY—AUGUST 11, 1978

THE COURT: I asked you to come here today, gentlemen, to sort of look at the future course of this litigation.

What motions do the Plaintiffs deem are now pending?

MR. HARRINGTON: Your Honor, we have our Motion for Summary Judgment pending. And today, we filed a Motion for an Interlocutory Injunction on an EDA project in Belt, Montana. We just filed this with the Court.

I think these are the only motions that we have pending, Your Honor.

THE COURT: What do the Defendants conceive to be pending in the way of motions?

MR. UGELOW: I am Richard Ugelow from the Department of Justice. I'm here in the place of Jerry Hartman.

I think there is one additional motion. That is the Preliminary Injunction in Lockrem, the Billings case. I don't believe the Court has denied or ruled on that injunction.

MR. HARRINGTON: That is correct.

THE COURT: That was taken under advisement, and I had a written opinion denying that injunction on the basis of these others. And then, of course, this Belt business came up, which cast some different problems, I think, than we have heretofore faced.

The reason for the denial of it, the reasons for the denial of the Preliminary Injunction, and in the main case, of course, maybe no longer exists. You don't have the numbers of people involved. We don't have the— the emergency is largely over as near as I know, except with respect to one contract up in Belt. So the exigible considerations, I think, are perhaps different.

Of course, there is pending a motion, I think, by the City of White Sulphur Springs with respect to the damage issue. And I am not going to waste much time on that because it just seems to me pretty simple. If it hadn't been for the Federal Grant, there wouldn't have been any money, and if it hadn't been for the money, there wouldn't have been any request for bids, and if there had been no request for bids, Lockrem would be exactly where he is now.

On that basis, I am going to grant a motion in White Sulphur Springs favor.

I can tell you that I am, now that Bakke is down, I'm concerned about this Belt situation. So why don't you say what you want to say about that for the Plaintiff.

MR. HARRINGTON: Okay, Your Honor. On the issue of mootness, of course, our main thrust of our argument at that time was that there was a, of course, a possibility that one of the contractors might default and then thus • • •

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

No.

LLOYD C. LOCKREM, INC., a Montana corporation; LEN F. BLANCHER; JERRY L. PURDOM; and WATERWORKS SUPPLIES CO., a corporation, *Plaintiffs*,

—VS —

THE SECRETARY OF COMMERCE OF THE UNITED STATES; THE MONTANA STATE DISTRICT OFFICER OF THE MONTANA ECONOMIC DEVELOPMENT ADMINISTRATION; THE CITY OF WHITE SULPHUR SPRINGS, MONTANA; NETTA MAE BINNIE, TOM COBURN, EDWARD ROATCH, and ROBERT BORLAND, members of the City Council of White Sulphur Springs, Montana; and KENNETH BALLANTYNE, Mayor of White Sulphur Springs, Montana, *Defendants*.

Complaint

JURISDICTION

I.

This action arises out of the Public Works Employment Act of 1977, 42 U.S.C. Section 6701, *et seq.*, and alleges violations of the Constitution of the United States and Amendments Five and Fourteen thereto, and the Federal Civil Rights Acts of 1866 and 1964, 42 U.S.C. Sections 1981, 1983, and 1985, and 42 U.S.C. Section 2000D. This court has jurisdiction under 28 U.S.C. Section 1331. The estimated cost of the project, Economic Development Administration (EDA) Project No. 05-51-20681, is in excess of One Hundred Sixty-Eight ($168,000.00) Dollars, and the matter in controversy exceeds the sum or value of Ten Thousand

($10,000.00) Dollars, exclusive of interest and costs. A declaration of rights is also sought pursuant to 28 U.S.C. Section 2201, *et seq.*

PARTIES AND FACTUAL ALLEGATIONS

II.

Plaintiff Lloyd C. Lockrem, Inc. (hereafter "Lockrem") is a Montana corporation engaged in the construction business in the State of Montana and is a member of the Montana Contractors' Association.

III.

Lockrem has submitted its bid to the City of White Sulphur Springs, Montana, for the construction of "Water System Improvements, White Sulphur Springs, Montana," Economic Development Administration Project No. 05-51-20681, at White Sulphur Springs, Montana, a local public works project within the meaning of the Public Works Employment Act of 1977, Public Law 95-28 (hereafter "PWEA").

IV.

Juanita Kreps is the duly qualified and acting Secretary of Commerce of the United States and under and by virtue of the PWEA is charged with administering the said Act. Mickey Loff is the Montana State District Officer of the Economic Development Administration, through whom the Secretary acts in the administration of said PWEA.

V.

Under the Act, the Secretary is authorized to award grants to any state or local government for construction, renovation, repair, or other improvement of local public works projects (PWEA, Section 103(a)).

VI.

The Defendant Mayor and City Council of the City of White Sulphur Springs are the chief executive and the city council, respectively, of the City of White Sulphur Springs and are the grantees under the Act and have responsibility for the advertisement and acceptance of bids and awarding of contracts for all city public works projects under the Act.

VII.

In November, 1977, and prior to November 29, 1977, the Mayor and City Council of White Sulphur Springs caused to have advertised EDA Project No. 05-51-20681, designed by Morrison-Maierle, Inc., consulting engineers. Willis Wetstein is the engineer who designed this project.

VIII.

Included within the specifications for "Water System Improvements, White Sulphur Springs, Montana," (hereafter "the project") was the following requirement:

> "Work under this contract will be subject to the prevailing wage rates established by the U.S. Department of Labor, the Equal Employment Opportunity Requirements, and the 10 Percent Minority Enterprises requirements."

Said project was advertised November 17 and November 24, 1977.

IX.

As a condition of submitting their bids, the bidders were required to fill out the following paragraph:

> "In conformance with the Minority Business Enterprise (MBE) participation required for this project contained in the Special Provisions, the Bidder insures the Owner that the amount of $.....

> in the base bid is for qualified MBE subcontractors or suppliers. The Bidder agrees to provide a list of the MBE firms participating in this project at the time of the bid opening. Such list shall also contain the work to be performed by each MBE and the contract amount."

X.

After advertisement for bids, Lockrem commenced to prepare a bid and comply with the 10% MBE requirement; the Affidavit of Lloyd C. Lockrem, Jr., attached hereto as Exhibit "A" and by reference incorporated herein, details the efforts to which he went on behalf of Lockrem to satisfy the 10% MBE requirement. Lockrem was not able to satisfy the full 10% MBE requirement and was able to contract out only $5,000.00 of his total bid to a bona fide minority business enterprise.

XI.

On November 29, 1977, at 7:30 P.M., the engineer, Willis Wetstein, opened the bids submitted for the project. The bids were, in descending order:

Bidder:	*Amount*
John-Boy Construction Co.	$206,360.00
Salveson Construction	$201,935.00
White & McNeil Construction Company	$200,365.00
Volk Construction Company	$177,811.50
4G Plumbing & Heating	$176,146.00
Cop Construction Company	$175,525.00
Clause Excavating	$172,585.00
Lloyd C. Lockrem, Inc.	$168,130.86

Lockrem was the low responsible bidder and would have been awarded the contract had it been able to comply with the 10% MBE requirement.

XII.

On December 1, 1977, Lockrem's bid was rejected, although conceded by the Mayor and City Council of White Sulphur Springs as being qualified and low (qualified in all respects except as to satisfaction of the 10% MBE requirement), because it had not satisfied the 10% MBE requirement and had to be rejected as non-responsive. The Mayor and City Council accepted the bid of the second low bidder, Clause Excavating, and awarded the contract to that firm.

XIII.

On July 22, 1976, the United States Congress enacted the Public Works Employment Act of 1976 (42 U.S.C. Section 6701, *et seq.*). Section 6727(a) of this act provides:

> "(a) No person in the United States shall on the grounds of race, religion, color, national origin, or sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under this subchapter."

XIV.

On May 13, 1977, the United States Congress enacted the Public Works Employment Act of 1977 (Pub.L.No. 95-28), which increased the authorization for, supplemented, and amended the 1976 act. Under the Public Works Employment Act and the amendments thereto, local entities may apply for federal grants for the construction of public works facilities. The primary purposes of both the Public Works Employment Act and the amendments thereto are to alleviate unemployment and to promote the expeditious construction of needed facilities (42 Fed.Reg. 27, 432 (May 27, 1977)). While Section 6727(a) of the original act remains unchanged, among the 1977 amendments to the original act is Section 103(f)(2):

> "(2) Except to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least ten per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term 'minority business enterprise' means a business at least fifty per centum of which is owned by minority group members or, in case of a publicly owned business, at least firty-one per centum of the stock of which is owned by miniority group members. For the purposes of the preceeding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts."

XV.

On May 27, 1977, the Secretary of Commerce issued regulations implementing Public Law No. 95-28. Included in these regulations are specific sections dealing with the above-mentioned provision:

Section 317.19:

> "(b) *Minority Business Enterprise* (1) No grant shall be made under this part for any project unless at least ten percent of the amount of such grant will be expended for contracts with and/or supplies from minority business enterprises.
>
> "(2) The restrictions contained in paragraph (1) of this subsection will not apply to any grant for which the Assistant Secretary makes a determination that the ten percent set-aside cannot be filled by minority businesses located within a reasonable trade area determined in relation to the nature of the services or supplies intended to be procured." 42 Fed.Reg. 27, 434-435 (May 27, 1977).

Section 317.35:

"An application shall be rejected unless it includes all the following materials:

"(a) It contains adequate certification by the applicant and by any 'other parties' as defined in 15 C.F.R. Subtitle A, part 8, that no person shall, on the grounds of race, color, sex (as required by § 110 of Pub. L. 94-369), or national origin, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under the proposed project.

"* * * (j) Unless the Assistant Secretary has made a determination of inapplicability under § 317.19(b)(2), it contains certification satisfactory to the Assistant Secretary that at least ten percent of the amount of the grant will be expended for contract with and/or supplies from minority business enterprises." 42 Fed. Reg. 27, 435-436 (May 27, 1977).

XVI.

In August, 1977, the Economic Development Administration (hereinafter "EDA"), an administrative division of the Department of Commerce, issued guidelines further implementing the minority quota provisions of the Public Works Employment Act of 1977. These guidelines include, among others, the following provisions:

(a) Prime contractors will be required in certain cases to engage minority business enterprises from locations "far from the project."

(b) Prime contractors will be expected to use minority business enterprises (hereinafter "MBEs") "with less experience than available non-minority enterprises and should expect to provide technical assistance to MBEs as needed. Inability to obtain bonding will ordinarily not disqualify an MBE."

(c) "In the case of projects to be administered through one prime contract, the ten percent MBE requirement would be met if the prime contractor is an MBE or if at least ten percent of the grant funds are expended for MBE subcontractors or suppliers." On information and belief, Plaintiffs allege that the EDA has interpreted the former requirement to indicate that a non-minority prime contractor, who does not wish to subcontract with or get supplies from MBES, cannot submit a responsive bid unless it joint ventures with an MBE at least 50-50.

(d) Waivers of the 10% minority quota will be granted only "under exceptional circumstances."

(e) While a grantee under the Act, which must be a state or local governmental unit, may apply for a waiver of the 10% MBE requirement (13 C.F.R. Section 317.19), there are no statutory nor regulatory means by which Lockrem, a contractor, may request such waiver and the guidelines state: "only the Grantee can request a waiver." Lockrem did request the City of White Sulphur Springs to seek a waiver of the 10% MBE requirement.

XVII.

Plaintiff Waterworks Supplies Co. is a corporation duly licensed and authorized to do business in the State of Montana with one of its offices located in Billings, Montana; that Harry Shoman is the local manager for Waterworks Supplies Co. (hereafter "Waterworks"); Waterworks is a non-minority business enterprise. As outlined in Exhibit "A," Waterworks submitted a bid for pipe and other materials to be used by Lockrem on the project. Waterworks' bid was low, and that bid was incorporated into the Lockrem bid.

XVIII.

As is reflected in the Affidavit of Harry Shoman, attached as Exhibit "B" and by reference incorporated herein, Waterworks also submitted a bid for pipe and other materials to the successful bidder on the project, Clause Excavating; Plaintiff Waterworks' bid for pipe and materials was rejected by Clause solely on the basis that it was not a minority business enterprise, and Waterworks is informed and believes and, therefore, alleges that Clause accepted the order of a minority business enterprise firm whose bid was higher than the one submitted by Waterworks.

XIX.

Plaintiff Len F. Blancher is a resident of the State of Montana and a member of Operating Engineers Local 400; Plaintiff Jerry L. Purdom is a resident of Montana and a member of Local 400 of the Operating Engnneers; Blancher and Purdom were employed by Lockrem on November 29, 1977, at the time Lockrem submitted its bid on the project; if Lockrem had been awarded the contract to construct the project, Blancher and Purdom would have continued in the employment of Lockrem; that the approximate length of employment would have been 6 weeks for both Blancher and Purdom; that as a direct and proximate result of the imposition of the 10% MBE requirement, a requirement solely based upon race or national origin, Lockrem was denied the opportunity to perform the project in White Sulphur Springs, as a direct and proximate result of which, Blancher and Purdom were denied their constitutional right to employment; that both Purdom and Blancher, as reflected in Exhibits "C" and "D" attached hereto and by reference incorporated herein, are presently unemployed, and because of the time of year, do not expect to be employed during the 6-week period that they would have been employed had Lockrem been awarded the project in White Sulphur Springs.

XX.

The Fifth Amendment to the United States Constitution guarantees that no person shall "be deprived of life, liberty, or property, without due process of law." This guarantee incorporates the equal protection provisions of the Fourteenth Amendment in any action which would be held to deny a person equal protection would be held to be a denial of due process under the Fifth Amendment. *Johnson* v. *Robison,* 415 U.S. 361 (1974).

XXI.

The above-mentioned equal protection and due process clauses prohibit government actions which classify persons on the basis of race or national origin unless the classification bears a reasonable relation to the legitimate purposes of the action, a compelling state need is demonstrated for the action, and there is no other way to effectuate this interest which would be less burdensome on constitutional rights. *Dunn* v. *Blumstein,* 405 U.S. 330 (1974).

XXII.

A specific section of the PWEA of 1976 (42 U.S.C. Section 6727) and regulations, Section 317.35(a), implementing the PWEA of 1977 (42 Fed.Reg. 27, 435 (May 27, 1977)) guarantee the right not to be excluded from these projects on the grounds of race, color, sex, or national origin.

XXIII.

At all times herein mentioned, Plaintiffs, and each of them, have been persons within the meaning of the Fifth Amendment of the United States Constitution.

XXIV.

The Secretary of the Department of Commerce and the Economic Development Administration have adopted and are presently implementing a policy, and did implement

said policy in awarding the grant to the project in White Sulphur Springs, under color of federal statute and regulation, granting federal aid only if White Sulphur Springs gave assurance that at least 10% of the grant would be expended for minority business enterprises. White Sulphur Springs has not requested a waiver, since Plaintiffs challenge only the constitutionality of the quota provision.

XXV.

In rejecting Lockrem's bid, the Defendants have enforced a racial policy which is unconstitutionally discriminatory of all of the Plaintiffs' rights guaranteed under the Fifth and Fourteenth Amendments to the United States Constitution.

XXVI.

A section of the Public Works Employment Act of 1976 (42 U.S.C. Section 6727) and regulations, Section 317.335 (a), implementing the Public Works Employment Act of 1977 (42 Fed.Reg. 27, 435 (May 27, 1977)) guarantee the right not to be excluded from projects on the grounds of race, color, sex, or national origin, and emphasize the duty not to do so. In giving these rights and duties on the one hand and on the other hand setting up a minority quota system as detailed above, which acts counter to these rights and duties, Defendants have acted arbitrarily and capriciously and contrary to law, thereby denying Plaintiffs the due process guaranteed under the Fifth Amendment to the United States Constitution.

XXVII.

This action seeks a declaratory judgment, pursuant to the provisions of 28 U.S.C. Section 2201 and Section 2202, for the purpose of determining the following questions in actual controversy between the parties:

(a) Whether Federal Defendants may implement and enforce a statute or regulation by which federal grants for public works construction and participation in the White Sulphur Springs project are alloted to local entities only upon the assurance that the entity will adopt a quota system by which money is allotted to business persons on the basis of their race or national origin, as was done in this case;

(b) Whether the Local Defendants may implement or enforce a policy, practice, custom, or usage of devising, approving, and advertising bid specifications and awarding bids for projects funded by the Public Works Employment Act of 1977, which include the requirement that the bidding contractor must make a commitment to expend a certain sum, which is at least 10% of the project grant, with minority business enterprises, as was done in this case; and

(c) Whether Defendants may exclude Lockrem from being selected as a contractor on the White Sulphur Springs project financed by Federal Defendants and let and awarded by Local Defendants, solely because of the race or national origin of the Plaintiff, by declaring its bid to be non-responsive because it did not meet the quota established by the Act and the contract documents.

INJUNCTIVE RELIEF NECESSARY AND PROPER

XXVIII.

Section 103(f)(2) is unconstitutional and void and violates the provisions of the Fifth and Fourteenth Amendments of the Constitution of the United States for a number of reasons, including the following:

(a) The Act creates a quota system based on race and national origin alone and constitutes invidious and unreasonable discrimination against Plaintiffs who will

be excluded from the benefits of this program due solely to their race or national origin;

(b) The Act is arbitrary, capricious, and unreasonable in that it cannot be complied with, to-wit: The Act requires compliance with the Federal Civil Rights Act of 1866 and 1964 (42 U.S.C. Sections 1981, 1983, and 1985) and also compels discrimination on the basis of race alone (42 U.S.C. Section 2000D); in addition, Section 103(f)(2) of the Act conflicts with 42 U.S.C. Section 6727 of the PWEA of 1976 as set forth in paragraph XXVI above;

(c) The Act arbitrarily and capriciously interferes with Plaintiffs' freedom to contract as guaranteed by the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution.

XXIX.

Although all quotas based on race are unconstitutional, the quota established in the Act is particularly discriminatory in the State of Montana, since minority persons constitute only 4.1% of the total population of the State of Montana. Thus, minority business participants under the 10% MBE requirement would be in far greater proportion than their numbers in the Montana business communities or the population in general would support.

XXX.

Lockrem, in computing its bid, estimated its gross profit to be 20% of the bid or $33,626.17. By having its bid rejected on the grounds it was unresponsive, Lockrem has been directly and proximately damaged in the sum of $33,626.17. In addition, Lockrem has suffered unusual and irreparable damage and hardship in that Lockrem is a going business enterprise; one of the assets of a going business enterprise is its ability to employ its work force and its equipment as continuously as possible so that key personnel and highly trained workers will not be lost and so that the driving force or momentum of the firm will not be dissipated through inactivity. As a direct and proximate result of its bid being rejected, Lockrem has sustained this type of damage; quantification, i.e., in dollars, of such type of damage is impossible, and an award of money damages will not constitute adequate relief nor compensate Plaintiff for such loss of key personnel and business momentum.

XXXI.

Plaintiffs Blancher and Purdom have no adequate remedy at law for loss of employment opportunity proximately caused by imposition of the racial quota and the declaration of the bid as non-responsive purely on the basis of race or national origin requirements.

XXXII.

The Plaintiff Waterworks has been irreparably damaged and has no adequate remedy at law because it has lost a business opportunity to sell pipe and other materials on the project purely on the basis that it is a non-minority business enterprise and under the quota system established under the Act and the policies implemented by the Federal Defendants, has been rejected by the second highest bidder and prevented from selling its supplies and materials to the lowest bidder, Lockrem.

XXXIV.

The Defendants' acts in imposing such 10% MBE quota on the project have caused the Plaintiffs severe and irreparable harm, damage, and injury unless enjoined; such irreparable injury includes the wrongful discrimination and deprivation of the opportunity to perform the project and the right to employment.

XXXV.

Clause Excavating, as low bidder on the project, is required to commence work on or before December 14, 1977, and Plaintiff Lockrem is informed and believes and, therefore, alleges that notice to proceed will be given to Clause Excavating within the next 7 days. Therefore, unless commencement of construction of the project is enjoined, Plaintiffs will forever lose and be deprived of the opportunity to participate in said project, perform the same, and perform work on the same and will be deprived of the economic benefits available under the project.

XXXVI.

If the project is not enjoined, the City of White Sulphur Springs, Montana, will be deprived of the right to have the project performed for a cheaper price and thus will irretrievably lose the bargain of the lowest bid. Acceptance of the second high bid and rejection of the low qualified Lockrem bid of $168,130.86 is a violation of Montana law. Section 11-1202, Revised Codes of Montana, 1947.

XXXVII.

The attorneys for the Plaintiffs have contacted the City of White Sulphur Springs, the United States Attorney's Office for the State of Montana, and the Economic Development Administration and have advised them that Plaintiffs will apply to the District Court for the District of Montana, Billings Division, The Honorable James Battin presiding, for a temporary restraining order. In view of the immediate pendency of commencement of construction on said project, Plaintiffs will suffer irreperable harm by the delay that would be encountered in giving Defendants further notice of this temporary restraining order.

XXXVIII.

An actual controversy has arisen and now exists between Plaintiffs and Defendants concerning their respective rights and duties in that the Plaintiffs contend that Defendants' policy, practice, custom, usage, statute, or regulation by which federal aid for construction of the project is allocated on a quota system based on race is a violation of Plaintiffs' constitutional rights under the Fifth Amendment to the United States Constitution; whereas, these Defendants dispute these contentions and contend that their policy, practices, custom, usage, statute, or regulation regarding the allocation of federal aid for the project on the basis of a quot asystem based on the race of the contractors or suppliers is lawful in every respect.

XXXIX.

Plaintiffs desire a judicial determination of their rights and a declaration as to the legality of Federal Defendants' statute and/or regulation regarding the allocation of federal money for the construction of the project funded by the Public Works Employment Act of 1977 based on the race of the contractors submitting bids or business persons providing supplies.

XL.

Plaintiffs desire a judicial determination of their rights and a declaration as to the legality of Local Defendants' policy, practice, custom, or usage of devising, approving, advertising, and awarding a bid for the project funded by the Public Works Employment Act of 1977 which require that the Plaintiff Lockrem must expend a certain amount, which is at least 10% of the project grant, in this case $16,830.09, with minority business enterprises.

XLI.

Such a declaration is necessary and appropriate at this time in order that Plaintiffs may ascertain their rights and determine whether Defendants' actions are lawful.

WHEREFORE, Plaintiffs respectfully pray this court as follows:

1. Issue a declaratory judgment finding that Section 103(f)(2) of the Public Works Employment Act of 1977 and the regulations promulgated under that section which allocate federal funds for the construction of the project based on the race of contractors submitting bids or business persons providing supplies is a violation of Plaintiffs' constitutional rights under the due process guarantees of the Fifth Amendment to the United States Constitution;

2. Issue a declaratory judgment finding that the Local Defendants' policy, practice, custom, or usage of approving, advertising, and awarding bids for the project funded by the Public Works Employment Act of 1977 which require that Plaintiff Lockrem must expend a certain amount, which is at least 10% of its bid, with minority business enterprises is a violation of the Plaintiffs' constitutional rights under the due process guarantees of the Fifth Amendment of the United States Constitution, as made applicable to local government entities through the Fourteenth Amendment;

3. That upon a final hearing, a permanent injunction issue until this cause shall have been adjudicated by this court on the merits;

4. Pending hearing and determination of this case, grant a temporary restraining order and preliminary injunction restraining and enjoining Local Defendants, and each of them, their officers, agents, servants, employees, and successors, and all persons in active concert or participation with them, from commencing or ordering the commencement of work on the project, and from refusing to accept Lockrem's bid as the lowest responsible, qualified, and competitive bid for the project and on the same terms and conditions applicable to designated minority persons;

5. Pending hearing and determination of this case, grant a temporary restraining order and preliminary injunction restraining and enjoining Federal Defendants, and each of them, their officers, agents, servants, employees, and successors, and all persons in active concert or participation with them, from withdrawing funds for the project or from conditioning funding of the project on its commencement within 90 days of the EDA grant;

6. That in the event injunctive relief is not granted, Plaintiff Lockrem recover judgment against Local Defendants in the sum of $33,626.17;

7. That Plaintiffs receive all costs and expenses incurred in the prosecution of this action, including a reasonable attorney fee.

8. That Plaintiffs receive such other additional relief as is just and equitable.

DATED this 6th day of December, 1977.

LLOYD C. LOCKREM, INC.
By /s/ LLOYD C. LOCKREM, JR.
President

STATE OF MONTANA)
: ss
County of Yellowstone)

Lloyd C. Lockrem, Jr., being first duly sworn upon his oath, deposes and says:

That he is the President of Lloyd C. Lockrem, Inc., one of the Plaintiffs in the above-entitled action, and makes this verification for and on behalf of said corporation; that he has read the above and foregoing Complaint and knows the contents thereof and that the statements therein made are true to his own knowledge.

/s/ LLOYD C. LOCKREM, JR.
Lloyd C. Lockrem, Jr.

Subscribed and sworn to before me this 6th day of December, 1977.

/s/ URBAN L. ROTH

Notary Public for the State of Montana
Residing at Butte, Montana

My commission Expires: 11/10/79

(Notarial Seal)

ULR:ch

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

No.

LLOYD C. LOCKREM, INC., a Montana corporation, et al.,
Plaintiffs,

—VS—

THE SECRETARY OF COMMERCE OF THE UNITED STATES; et al.,
Defendants.

AFFIDAVIT OF LLOYD C. LOCKREM, JR.

STATE OF MONTANA)
: ss
County of Yellowstone)

Lloyd C. Lockrem, Jr., being first duly sworn upon his oath, deposes and says:

I am president of Lloyd C. Lockrem, Inc. (hereafter "Lockrem"), one of the Plaintiffs herein. Lockrem is a non-minority contractor within the meaning of the Public Works Employment Act of 1977. I prepared a bid on behalf of Lockrem for EDA Project No. 05-51-20681 in White Sulphur Springs, Montana, which I submitted at 7:30 P.M. November 29, 1977. The amount of my bid was $168,130.86. Although I made earnest effort to secure bids from subcontractors and suppliers in an attempt to comply with the bid document specifications requiring 10% of the bid be awarded to minority business enterprises, after due and diligent effort, I was able to award only $5,000.00 of the bid amount to MBEs. A diary of my efforts to procure MBEs and submit a responsive bid pursuant to contract

specifications is attached hereto as Schedule "1" and by reference incorporated herein.

1. AFFIDAVIT OF LLOYD C. LOCKREM, JR.

EXHIBIT "A"

On November 30, 1977, I delivered to Willis Wetstein, engineer for the project, the letter, a copy of which is attached to this affidavit as Schedule "2" and by reference incorporated herein.

My firm has complied with all equal employment opportunity requirements imposed upon it by law and by contract, and for the last 2 years, minority persons have comprised 14% of the total number of employees employed by my firm.

On November 29, 1977, the day Lockrem submitted its bid on the project, Lockrem had in its employment Len F. Blancher, Jerry F. Purdom, and 3 other employees. Soon after Lockrem was informed that its bid was non-responsive, Blancher and Purdom, along with the 3 other Lockrem employees, were laid off for reasons of reduction of work force. Had Lockrem been awarded the bid, all 5 of those men woud have been employed by Lockrem on the White Sulphur Springs project. I believe that the work on the project would have been completed within 6 to 7 weeks of commencement, which would have meant 6 to 7 weeks of employment—thus wages—for each of the 5 men.

Lockrem had accepted the bid of Waterworks Supplies Co., a corporation with Billings offices, as a local bidder for pipe and other materials. Obviously, since Lockrem's bid was accepted and was rejected as being unresponsive, Lockrem will not be in a position to accept Waterworks' bid purely on the basis of Lockrem's inability to satisfy the 10% MBE requirement.

I have read the Complaint and the statements therein are true.

Further affiant sayeth not.

/s/ LLOYD C. LOCKREM, JR.
Lloyd C. Lockrem, Jr.

Subscribed and sworn to before me this 6th day of December, 1977.

/s/ URBAN L. ROTH

Notary Public for the State of Montana
Residing at Butte, Montana
My Commission Expires: 11/10/79

(Notarial Seal)

ULR:ch

Schedule I

The following are actions taken by myself or members of my firm, in order to comply with the Minority Business Enterprise provisions for the contract EDA#05-51-20681 for Water Systems Improvements at White Sulphur Springs, Montana.

November 21, 1977: Met with Terry Bass, Secretary-Manager, Montana Contractors' Association and reviewed the Minority Business Enterprise Directory compiled by the Montana Contractors' Association, and found no Minority Business Enterprises which appeared to apply to project.

Tried to contact Minority Business Enterprise, John R. Glenn, Vector, Inc. Left callback with his answering service.

November 23, 1977: Contacted Elmer Schye, former contractor and resident of White Sulphur Springs. He knew of no Minority Business Enterprises located in the immediate vicinity of the project.

9:30 a.m. Contacted John Glenn, Minority Business Enterprise, owner of Vector, Inc. Briefly outlined the project to him and set up a meeting for Friday, November 25, 1977, to discuss his possible participation in the project. Contacted Willis Wetstein of Morrison-Maierle, Inc., Consulting Engineers on the project. Willis stated he had received one call from a Minority Business Enterprise and had provided him with a planholders list so he could contact general contractors.

Received quotations on restoration and material from:

1. Helena Sand & Gravel (Non minority)
2. Empire Sand & Gravel (Non minority)

5:00 p.m. Contacted a person who identified herself as Patty Johnson, Office Manager of the Billings Branch of Colorado Economic Development Corporation (CEDA). Requested from her, assistance in locating Minority Business Enterprises for the referenced project. She referred me to one potential supplier for the project. Ferd's Hardware Store, Evanston, Wyoming, telephone number 307-789-3070. She also stated she would continue looking for qualified Minority Business Enterprises and contact me on Friday, November 25th.

5:15 p.m. Contacted Ferd's Hardware Store and talked to a person who identified himself only as "Ferd". I provided him with a complete takeoff of materials for the project. He informed me he would have prices on the following Monday morning, and requested that I return a call to him at that time. He would not send me a written quotation and did not know what brand of pipe he was selling. He indicated that pricing would be provided to him from someone in Salt Lake City, Utah.

November 25, 1977:

9:30 a.m. Called the Billings office of CEDA and received a recorded message that no one would be in the office this day and I left a tapped callback for Patty Johnson, Office Manager.

November 25, 1977:

9:32 a.m. Telephoned Willis Wetstein at 442-3050. Willis was not in but talked to Mark Benedetti. He said he would send a planholders list. We verbally reviewed the planholders and he gave me the names of Antonia Bastien and Elias A. Casallas, Denver, Colorado.

10:20 a.m. Dick Glenn (MBE) President of Vector, Inc. called to say he would not be able to make this morn-

ings meeting and was not interested in the White Sulphur Springs job.

10:30 a.m. Mark Benedetti from Morrison-Maierle in Helena called and identified the two names he had given me earlier as employees of CEDA in Denver and Billings.

11:20 a.m. Received a call from Charlie Chamberlin of A.B.C. He knew of no Minority Business Enterprise, but would pursue the matter.

2:30 p.m. Received a call from Charlie Chamberlin of A.B.C. He advised me that he contacted Randy Simon of the Bureau of Indian Affairs. Mr. Simon is to submit a list of qualified Minority Business Enterprises on Monday.

3:10 p.m. Talked to Terry Bass of the Montana Contractors' Association. He had no further information on Minority Business Enterprises for the White Sulphur Springs Project.

November 28, 1977:

3:30 p.m. Contacted my home office in Billings. Charlie Chamberlin of A.B.C. had submitted a list of Minority Business Enterprises to my office. The only Minority Business Enterprise which qualified on the list submitted by the Bureau of Indian Affairs was John R. Glenn. He had already indicated to me that he was not interested in the project.

3:50 p.m. Contacted CEDA telephone number 248-3105. Talked with Patty Johnson, Office Manager and she indicated she had no Minority Business Enterprises available for the project, other than Ferd's Hardware Store. I questioned her as to the responsibility of CEDA in providing us with Minority Business Enterprises, and also asked for the name of alternate help, since they did not seem to be able to meet our needs.

She then put me on the phone with Tony Bastien and I posed the same questions to him. He submitted the name of a potential Minority Business Enterprise for restoration on the project. It was Douglas J. Standing Bear at Havre, Montana. I also asked if a determination had been made on whether or not landless Indians qualified as Minority Business Enterprises. Mr. Bastien did not know the answer to this question and suggested I contact Dan Rustemyer in their Denver Office, telephone number 303-573-3921. I indicated that the answer to this question was not imperative at this time and would contact them after the bid opening or prior to bidding another EDA Project.

November 28, 1977:

4:03 p.m. Made a telephone call to Ferd's. Received busy signal on ten attempts to complete call.

4:12 p.m. Looked for telephone number for Douglas J. Standing Bear. No listing.

4:15 p.m. Made telephone call to Ferd's again. Line still busy.

4:16 p.m. Telephoned CEDA Office and talked to Patty Johnson to see if she could give me the telephone number of Douglas J. Standing Bear. I was given the number—395-4420.

4:17 p.m. Called Douglas Standing Bear's number—line was busy.

4:18 p.m. Tried Ferd's telephone number again and received a busy signal. Then tried Standing Bear's number again and received a busy signal. Tried Ferd's again and received the busy signal.

4:19 p.m. Again tried Standing Bear's number and there was no answer.

4:20 p.m. Dialed Ferd's Hardware and talked to Ferd. He said he had no prices but to call back in the morning.

November 29, 1977:

11:20 a.m. Called Ferd's Hardware—received busy signal.

11:02 a.m. Called Ferd's Hardware—received busy signal.

11:12 a.m. Called Ferd's Hardware—received busy signal.

11:19 a.m. Called Ferd's Hardware again and was able to make the connection. He advised that I should call back before noon and he would have the prices extended.

11:28 a.m. Met with Pat LaSalle and Tom Bates of LaSalle Construction, East Helena, Montana. LaSalle is a qualified Minority Business Enterprise, as indicated by the directory compiled by the Montana Contractors' Association. Reviewed the project with them and they indicated they would have prices for me early this afternoon.

11:50 a.m. Called Ferd's Hardware—received busy signal.

12:20 p.m. Called Ferd's Hardware—received busy signal.

1:00 p.m. Met against at the Coach House Motor Motel Hotel with Tom Bates and Pat LaSalle of LaSalle Construction. They submitted a quotation for the PVC water line material needed for the project. I reviewed the quotation with them and indicated to them that their quote for material was substantially higher than other supplier's quotations on the project. Tom Bates stated he would call the factory and attempt to get an adjustment or reduction in price in order to be more competitive. We then discussed the possibility of a sub-contract, in the event they could not meet material prices. After considerable discussion, it was

agreed that I would rent dump trucks from them to transport crushed aggregate from the crusher set up at White Sulphur Springs and also supplement their income by renting needed construction equipment from their firm. The total amount of this transaction would be in the neighborhood of $5,000. At this point in compiling the bid, this was the only dollar amount and Minority Business Enterprise available to my firm.

1:17 p.m. Telephoned Ferd's Hardware—received busy signal.

1:45 p.m. Contacted Ferd's Hardware Store and talked with Ferd. He said he had prices available and began to dictate them to me. Several questions arose and Ferd excused himself from the line and put me in contact with a person who identified himself as a Herb Berg, Estimator and Purchasing Agent for Ferd's Hardware Store. I questioned Mr. Berg as to whether or not he was a Minority and he indicated he was not. He then proceeded with the quotations for materials on the project.

3:30 p.m. Delivered completed bid to Willis Wetstein of Morrison-Maierle for transport to the Council meeting at White Sulphur Springs.

4:00 p.m. I contacted my home office in Billings and received a quotation from Oscar Blanco, identifying himself as Manager of Four States Steel & Pipe Co., telephone number 801-292-6891.

4:15 p.m. Attempted to contact Oscar Blanco at the telephone number I had received from my home office and talked with a young girl who stated she had just returned home from school and did not know where her father was or how he could be reached.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

No. CV-77-62-M

MONTANA CONTRACTORS' ASSOCIATION, a Montana non-profit corporation; and LLOYD C. LOCKREM, INC., a Montana corporation, Plaintiffs,

and

DONNA HIGGINS, d/b/a HIGGINS & Co., Plaintiff-Intervenor,

vs.

THE SECRETARY OF COMMERCE OF THE UNITED STATES, THE MONTANA STATE DISTRICT OFFICER OF THE MONTANA ECONOMIC DEVELOPMENT ADMINISTRATION, and THE CITY OF KALISPELL, Defendants.

Amended Complaint

JURISDICTION

I.

This action arises out of the Public Works Employment Act of 1977, 42 U.S.C. Section 6701, *et seq.*, and alleges violations of the Constitution of the United States and Amendments Five and Fourteen thereto, and the Federal Civil Rights Act of 1866 and 1964, 42 U.S.C. Sections 1981, 1983, and 1985, and 42 U.S.C. Section 2000D. This court has jurisdiction under 28 U.S.C. Section 1331. The estimated cost of the project, Economic Development Administration (EDA) Project No. 05-51-20682, is in excess of One Million Dollars, and the matter in controversy exceeds the sum or value of Ten Thousand ($10,000.00) Dollars, exclusive of interest and costs. A declaration of rights is also sought pursuant to 28 U.S.C. Section 2201, *et seq.*

PARTIES

II.

Plaintiff Montana Contractors' Association is a Montana corporation and trade association consisting of members who are primarily Montana contractors, most of whom are non-minority contractors within the meaning of the Public Works Employment Act of 1977 (hereafter "PWEA"), Pub.L. 95-28, 91 Stat. 116.

III.

Plaintiff Lloyd C. Lockrem, Inc. is a Montana corporation engaged in the construction business in the State of Montana and is a member of the Montana Contractors' Association.

IV.

Plaintiff Lloyd C. Lockrem, Inc. and certain non-minority members of the Montana Contractors' Association have submitted their bids to the City of Kalispell for the construction of storm drain improvements under Economic Development Administration Project No. 05-51-20682 at Kalispell, Montana, a local public works project within the meaning of the PWEA, and other members of the association have and will bid upon other public works projects funded by the PWEA and administered by the Economic Development Administration.

V.

The members of Plaintiff Montana Contractors' Association have bid on and have been awarded construction contracts within their jurisdiction of a similar nature to said project.

VI.

The Plaintiff and other members of the Montana Contractors' Association, in their capacities as contractors and subcontractors, rely upon contracts with municipal and

state governments for a substantial portion of their business.

VII.

Juanita Kreps is the duly qualified and acting Secretary of Commerce of the United States and under and by virtue of the PWEA is charged with administering the said Act. Mickey Loff is the Montana State District Officer of the Economic Development Administration, to whom the Secretary acts in the administration of said PWEA.

VIII.

Under the Act, the Secretary is authorized to award grants to any state or local government for construction, renovation, repair, or other improvement of local public works projects (PWEA, Section 103(a)).

IX.

The City of Kalispell, Montana, is a potential grantee under the Act and has responsibility for the advertisement and acceptance of bids and awarding of contracts for public works projects of the state under the Act.

X.

The Defendant Mayor of the City of Kalispell is the chief executive of the city, which is a potential grantee under the Act, and has responsibility for the advertisement and acceptance of bids and awarding of contracts for all city public works projects under the Act.

XI.

Other state and municipal governments have submitted requests to the Economic Development Administration for grants, and the City of Kalispell has requested certain such grants.

XII.

The City of Kalispell has received approval for that project known as EDA Project No. 05-51-20682 at Kalispell, Montana, a local public works project within the meaning of the Act, and has advertised for the letting of bids under the project. Additionally, the State of Montana and other local governmental units of the State of Montana have applied for and received money grants, all of which incorporate the requirements of Section 103(f)(2) of the PWEA, more particularly described in Schedule "A" attached hereto and by this reference incorporated herein.

PUBLIC WORKS EMPLOYMENT ACT

XIII.

Section 103(f)(2) of the PWEA provides for at least ten (10%) percent of the amount of each grant under the Act to be expended for minority business enterprises and thus prohibits non-minority businesses such as Plaintiffs from participating in such percentage of the grants, solely on the basis of race.

XIV.

A grantee under the Act, which must be a state or local government unit, may apply for a waiver of the ten (10%) percent minority business enterprise requirement (13 C.F.R. Section 317.19), but there are no statutory nor regulatory means by which contractors may request such waiver.

XV.

The Plaintiff Lloyd C. Lockrem, Inc., on October 17, 1977, requested such waiver, and such waiver was refused by the Defendant.

XVI.

The Economic Development Administration Guidelines for 10% Minority Business Participation in LPW Grants

(August, 1977) specifically state that "(o)nly the Grantee can request a waiver."

XVII.

All bidders for the work to be financed through grants under the Act must agree in their bid to comply with the ten (10%) percent minority business enterprise quota, or their bid will be treated as non-responsive under the regulations promulgated under the Act. (The regulations appear in the May 27, 1977, Federal Register at pages 27,431 to 27,440.)

XVIII.

Under Section 103(f)(2) of the PWEA, the Defendant Secretary has required and is continuing to require assurances from all grantees that at least ten (10%) percent of the money granted will go to minority enterprises.

XIX.

This action seeks a declaratory judgment, pursuant to the provisions of 28 U.S.C. Section 2201 and Section 2202, for the purpose of determining the following questions in actual controversy between the parties:

(a) Whether Federal Defendants may implement and enforce a statute or regulation by which federal grants for public works construction are allotted to local entities only upon the assurance that the entity will adopt a quota system by which money is allotted to business persons on the basis of their race or national origin;

(b) Whether the Local Defendant may implement or enforce a policy, practice, custom, or usage of devising, approving, and advertising bid specifications and awarding bids for projects funded by the Public Works Employment Act of 1977, which include the

requirement that the bidding contractor must make a commitment to expend a certain sum, which is at least ten (10%) percent of the project grant, with minority business enterprises;

(c) Whether Defendants may continue to exclude contractor members of the Montana Contractors' Association from being selected as contractors on public construction contracts financed by Federal Defendants and let by Local Defendant, solely because of the race or national origin of the Plaintiff members, by declaring the bids of its contractor members to be non-responsive where the bids do not meet the quota established by the Act.

INJUNCTIVE RELIEF NECESSARY AND PROPER

XX.

Section 103(f)(2) is unconstitutional and void and violates the provisions of the Fifth and Fourteenth Amendments of the Constitution of the United States for a number of reasons, including the following:

(a) The Act creates a quota system based on race and national origin alone and constitutes invidious and unreasonable discrimination against association members who will be excluded from the benefits of this program due solely to the national composition of their membership;

(b) The Act is arbitrary, capricious, and unreasonable in that it cannot be complied with, to-wit: The Act requires compliance with the Federal Civil Rights Acts of 1866 and 1964 (42 U.S.C. Sections 1981, 1983, and 1985) and also compels discrimination on the basis of race alone (42 U.S.C. Section 2000D);

(c) The Act arbitrarily and capriciously interferes with association members' freedom to contract as guaranteed by the due process clauses of the Fifth and

Fourteenth Amendments of the Constitution of the United States.

XXI.

Although all quotas based on race are unconstitutional, the quota established in the Act has a special effect because the low percentage of subcontractors participating in EDA Project No. 05-51-20682 is far greater than the ten (10%) percent allocation would indicate. Minority business participants would thus be in far greater proportion than their numbers in the business communities or the population in general.

XXII.

The enforcement of the Act and the regulations and promulgations thereunder will work an unusual and irreparable hardship and burden upon the Plaintiffs and other members of the Montana Contractors' Association.

XXIII.

The said Act and the actions of the Defendants in imposing such quotas deprive and will continue to deprive the Plaintiffs and other non-minority businesses of the opportunity to participate in the economic benefits of the funds granted under said Act.

XXIV.

The Defendants' actions in imposing such quotas will cause the Plaintiffs and other non-minority contractors severe and irreparable harm, damage, and injury unless enjoined; such irreparable injury includes the wrongful discrimination and deprivation of the opportunity to participate in said economic benefits available under said Act.

XXV.

Plaintiffs have exhausted all administrative remedies available to them and have no adequate remedy at law.

FACTS SHOWING TEMPORARY RESTRAINING ORDER IS NECESSARY AND PROPER

XXVI.

The bids for EDA Project No. 05-51-20682 are scheduled to be submitted by eight o'clock p.m. on October 18, 1977, and those Plaintiffs, and particularly the Plaintiff Lloyd C. Lockrem, Inc., who have prepared bids to submit at said time have been unable to secure the required percentage of minority contractors; and unless the bidding on this project is enjoined, the said Plaintiffs will forever lose and be deprived of the opportunity to participate in said project and will be deprived of the economic benefits available under the project.

XXVII.

The attorneys for the Plaintiffs have contacted the City Attorney of Kalispell and the Montana Director of the Economic Development Administration and have advised them that Plaintiffs will apply to the District Court for the District of Montana, the Honorable Russell Smith presiding, for a temporary restraining order. In view of the immediate pendency of the bidding on said project, Plaintiffs will suffer irreparable harm by the delay that would be encountered in giving Defendants further notice of this temporary restraining order.

XXVIII.

An actual controversy has arisen and now exists between Plaintiff's members and Defendants concerning their respective rights and duties in that Plaintiff's members contend that Defendants' policy, practice, custom, usage,

statute, or regulation by which federal aid for construction of public works is allocated on a quota system based on race is a violation of Plaintiff's members' constitutional rights under the Fifth Amendment to the United States Constitution; whereas, Defendants dispute these contentions and contend that their policy, practice, custom, usage, statute, or regulation regarding the allocation of federal aid for public works construction on the basis of a quota system based on the race of the contractors or suppliers is lawful in every respect.

XXIX.

Plaintiff's members desire a judicial determination of their rights and a declaration as to the legality of Federal Defendants' statute and/or regulation regarding the allocation of federal money for the construction of public works projects funded by the Public Works Employment Act of 1977 based on the race of the contractors submitting bids or business persons providing supplies.

XXX.

Plaintiff's members desire a judicial determination of their rights and a declaration as to the legality of Local Defendant's policy, practice, custom, or usage of devising, approving, advertising, and awarding a bid for projects funded by the Public Works Employment Act of 1977 which require that bidders for each project must expend a certain amount, which is at least ten (10%) percent of the project grant, with minority business enterprises.

XXXI.

Such a declaration is necessary and appropriate at this time in order that Plaintiff's members may ascertain their rights and determine whether Defendants' actions are lawful.

WHEREFORE, Plaintiffs respectfully pray that this court:

1. Issue a preliminary injunction restraining Defendant Secretary of Commerce, her agents and employees, or any of them, and Defendant Economic Development Administration, its agents and employees, or any of them, from allocating or expending any further federal grants for projects funded under the Public Works Employment Act of 1977 which require that at least ten (10%) percent of each project grant be expended with minority business enterprises and from taking any further action in connection with such projects; and enjoining the City of Kalispell, its agents and employees, or any of them, from awarding bids for projects funded under the Public Works Employment Act of 1977 which require that at least ten (10%) percent of each project grant be expended with minority business enterprises and from taking any further action in connection with such projects, until this cause shall have been adjudicated by this court on the merits;

2. Issue a declaratory judgment finding that Section 103 (f)(2) of the Public Works Employment Act of 1977 and the regulations promulgated under that section which allocate federal funds for the construction of public works projects based on the race of contractors submitting bids or business persons providing supplies is a violation of Plaintiffs' constitutional rights under the due process guarantees of the Fifth Amendment to the United States Constitution;

3. Issue a declaraory judgment finding that the Local Defendant's policy, practice, custom, or usage of approving, advertising, and awarding bids for projects funded by the Public Works Employment Act of 1977 which require that bidders for each project must expend a certain amount, which is at least ten (10%) percent of the project grant, with minority business enterprises is a violation of the Plaintiffs' constitutional rights under the due process guarantees of the Fifth Amendment of the United States Con-

stitution, as made applicable to local governmental entities through the Fourteenth Amendment;

4. That upon a final hearing, a permanent injunction issue until this cause shall have been adjudicated by this court on the merits;

5. That Plaintiffs receive all costs and expenses incurred in the prosecution of this action, including a reasonable attorney fee; and

6. That Plaintiffs receive such other additional relief as is just and equitable.

DATED this 17th day of November, 1977.

POORE, MCKENZIE, ROTH,
ROBISCHON & ROBINSON, P.C.

By /s/ ILLEGIBLE
Attorneys for the Plaintiffs
Suite 400, Silver Bow Block
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APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

[title omitted in printing]

No. CV-77-62-M
No. CV-77-153-BLG

Notice of Appeal

NOTICE IS HEREBY GIVEN that the Montana Contractors' Association, a Montana non-profit corporation, and Lloyd C. Lockrem, Inc., a Montana corporation, do hereby appeal to the Supreme Court of the United States from the judgment dated January 10, 1979, which limits Plaintiffs' relief to only injunctive relief.

This appeal is taken pursuant to 28 U.S.C., Section 1252.

DATED this 9th day of February, 1979.

POORE, ROTH, ROBISCHON
& ROBINSON
and
KIRLIN, CAMPBELL & KEATING
ROBERT J. HICKEY, ESQ.
CLAUDIA JAMES, ESQ.

By /s/ URBAN L. ROTH
Attorneys for the Plaintiffs
1341 Harrison Avenue
Butte, Montana 59701

Filed Feb. 9, 1979.

Supreme Court, U. S.
FILED
MAY 25 1979
MICHAEL RODAK, JR., CLERK

No. 78-1546

In the Supreme Court of the United States

OCTOBER TERM, 1978

MONTANA CONTRACTORS' ASSOCIATION, ET AL.,
APPELLANTS

v.

JUANITA KREPS, SECRETARY OF COMMERCE
OF THE UNITED STATES, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

MOTION OF THE FEDERAL APPELLEE TO DISMISS OR AFFIRM

WADE H. McCREE, JR.
Solicitor General

DREW S. DAYS, III
Assistant Attorney General

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In the Supreme Court of the United States

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MONTANA CONTRACTORS' ASSOCIATION, ET AL., APPELLANTS

v.

JUANITA KREPS, SECRETARY OF COMMERCE OF THE UNITED STATES, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

MOTION OF THE FEDERAL APPELLEE TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of this Court, the Solicitor General, on behalf of the Secretary of Commerce, moves that this appeal be dismissed or, in the alternative, that the judgment of the district court be affirmed to the extent that it denies appellants the relief they seek.

OPINION BELOW

The opinion of the district court (J.S. App. 1a-10a) is reported at 460 F. Supp. 1174.

JURISDICTION

The final judgment of the district court was entered on January 10, 1979 (J.S. App. 13a). A notice of appeal was filed by appellants on February 9, 1979 (J.S. App. 61a). The jurisdictional statement was filed on April 10, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.[1]

STATUTES INVOLVED

28 U.S.C. 1252 provides:

> Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court of record of Puerto Rico, holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.
>
> A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court.

Section 103(f)(2) of the Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 117, 42 U.S.C. 6705(f)(2), is reprinted at J.S. 3-4.

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[1]The government also filed a notice of direct appeal to this Court on February 9, 1979. However, the Solicitor General subsequently determined not to appeal the district court's order, and the Secretary's appeal has not been docketed.

QUESTIONS PRESENTED

1. Whether the Court has jurisdiction of this appeal.

2. Whether the district court erred in denying appellants' motion to amend their complaint to seek damages from federal officials for adhering to a statute subsequently held unconstitutional.

3. Whether appellants, who did not seek damages in the district court, may present that claim for the first time on appeal to this Court.

STATEMENT

1. In 1976, Congress enacted the Local Public Works Capital Development and Investment Act of 1976, Pub. L. No. 94-369, 90 Stat. 999, which directed the Secretary of Commerce to disperse funds through the Economic Development Administration to provide for various public works projects to alleviate national unemployment. In May 1977, Congress amended the 1976 Act by passing the Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116. The new law, in addition to making $6 billion available for the period ending December 31, 1978, added a "minority business enterprise" (MBE) requirement (Section 103(f)(2), 42 U.S.C. 6705(f)(2)), which provides that "[e]xcept to the extent that the Secretary determines otherwise, no grant shall be made under this Act * * * unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises."

Regulations promulgated under the Act (13 C.F.R. 317.19(b)(2)) permit waiver of the MBE requirement when "the Assistant Secretary makes a determination that the 10 percent set-aside cannot be filled by

minority businesses located within a reasonable trade area determined in relation to the nature of the services or supplies intended to be procured." Under Economic Development Administration procedures, only a grantee may obtain a waiver. *EDA Minority Business Enterprise Technical Bulletin,* October 11, 1977, p. 5. Regional Directors of the EDA were delegated authority to grant such waivers. *Economic Development Administration Directive Systems,* Bulletin No. 32-77, effective September 1, 1977.

2. This appeal arises from two actions filed by appellants in the United States District Court for the District of Montana. The first (referred to in the Jurisdictional Statement as *Montana II*), filed on December 6, 1977, sought declaratory and injunctive relief against the Secretary of Commerce, the Montana State District Officer of the Montana Economic Development Administration, the City of White Sulpur Springs, Montana, and officials of that city (J.S. App. 22a-39a). Specifically, the complaint sought a declaratory judgment that Section 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. 6705(f)(2), is unconstitutional. Appellants also sought to enjoin enforcement of the provision with respect to a water systems improvement project funded by the Secretary for the City of White Sulphur Springs. In addition, the complaint sought damages against the "Local Defendants" in the amount of $33,626.17 (J.S. App. 39a).

The complaint alleged that appellant Lloyd C. Lockrem, Inc. ("Lockrem") had submitted the low bid on the project but that the contract was awarded to the next lowest bidder solely because Lockrem had not met the MBE requirement of assuring that 10% of the amount of the grant would be expended for minority

business enterprises (J.S. App. 25a-26a). The complaint also alleged that Lockrem requested the city of White Sulphur Springs, the grantee, to obtain a waiver (J.S. App. 29a). The damages were intended to compensate Lockrem for the profit it allegedly lost when the city rejected Lockrem's bid in favor of another bid that met the requirements of the Act.

At a pre-trial conference on August 11, 1978, the district court indicated that it would not award damages against the local defendants (J.S. App. 21a). Lockrem then moved on August 24, 1978, to amend its complaint to seek damages against Reginal Gant, a Civil Rights Specialist in the Denver Regional Office of the Economic Development Administration, on the ground that he had "summarily denied Lockrem's request for a waiver of the MBE requirement both directly and indirectly through city officials, and in doing so, acted arbitrarily, unreasonably, and unjustifiably * * *" (J.S. App. 16a). On October 4, 1978, the district court denied the motion to amend the complaint on the ground that the claim stated in the proposed amendment would be subject to a motion to dismiss under *Butz* v. *Economou,* 438 U.S. 478 (1978) (J.S. App. 14a).

The second case (referred to in the Jurisdictional Statement as *Montana I*), (filed on December 14, 1977, and consolidated with *Montana II*, was based principally on a public works project that the City of Kalispell, Montana, had advertised for bids. The complaint sought declaratory and injunctive relief against enforcement of Section 103(f)(2) because of its alleged unconstitutionality and also sought "such other additional relief as is just and equitable" (J.S. App. 59a-60a).

The second complaint claimed that appellants depend upon contracts with municipal and state governments for a substantial portion of their business (J.S. App. 51a-52a), that the City of Kalispell and other state and local governments are potential grantees under the Public Works Employment Act (*ibid.*), that "the Defendant Secretary has required and is continuing to require assurances from all grantees that at least ten (10%) percent of the money granted will go to minority enterprises" (*id.* at 54a), that "enforcement of the Act and the regulations and promulgations thereunder will work an unusual and irreparable hardship and burden" upon appellants and "will continue to deprive [appellants of] * * * economic benefits" (*id.* at 56a), and that appellants "have no adequate remedy at law" (*id.* at 57a). The complaint then alleged that immediate injunctive relief was necessary with regard to the Kalispell project because contracts were about to be awarded (*id.* at 57a).

The district court issued its opinion in the consolidated cases on November 24, 1978. The court held that Section 103(f)(2) was unconstitutional because it did not conform to the standards announced in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978). Although appellants had sought an injunction against enforcement of the provision with respect to several projects, the court only enjoined enforcement with respect to a public works project by the City of Belt, Montana, the sole remaining project for which the contract had not been let (J.S. App. 11a-12a).

ARGUMENT

1. This Court lacks jurisdiction of appellants' appeal. Appellants obviously do not challenge the district

court's holding that the MBE requirement of the Public Works Employment Act of 1977 is unconstitutional. Since they prevailed on that issue, they could not appeal it. *New York Telephone Co.* v. *Maltbie*, 291 U.S. 645 (1934); *Lindheimer* v. *Illinois Bell Telephone Co.*, 292 U.S. 151, 176 (1934). Rather, they seek (1) review of the district court's order denying a motion to amend the complaint in *Montana II* to assert a claim for damages and (2) a holding from this Court that they are entitled to damages from both the federal and local defendants in *Montana I*, a case in which they never asked the district court for damages. These are not issues that may be brought to this Court by direct appeal.

The statute (28 U.S.C. 1252) under which this Court's appellate jurisdiction is invoked provides for direct appeals from "an interlocutory or final judgment, decree or order * * * holding an Act of Congress unconstitutional * * *." Section 1252 is applicable only where "the basis of the decision below in fact was that the Act of Congress was unconstitutional * * *." *United States* v. *Raines*, 362 U.S. 17, 20 (1960). In *McLucas* v. *DeChamplain*, 421 U.S. 21, 31 (1975), the Court explained that the purpose of the statute, which "unambiguously mandated an exception to [the] policy" of minimizing the Court's mandatory docket[2], is "to afford immediate review in this Court in civil actions to which the United States or its officers are parties and thus will be bound by a holding of unconstitutionality."

Although the statute allows "any party" to appeal, this Court's decisions interpreting Section 1252 make

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[2]See *Gonzales* v. *Automatic Employees Credit Union*, 419 U.S. 90, 98 (1974).

clear that it is designed to provide for expeditious review of holdings against the constitutionality of congressional acts,[3] and appeals under Section 1252 accordingly have been limited to parties seeking review of such holdings. Hence, this Court has declined to review an order upholding an Act of Congress against constitutional challenge, *Norton* v. *Mathews*, 427 U.S. 524, 529 n.3 (1976), a holding that executive officers misconstrued an Act of Congress and applied it in an unconstitutional manner, *United States* v. *Christian Echoes National Ministry, Inc.*, 404 U.S. 561, 563-564 (1972), and a holding construing an Act of Congress so as to avoid unconstitutionality. *International Ladies Garment Workers Union* v. *Donnelly Garment Co.*, 304 U.S. 243, 251 (1938). Similarly, this appeal does not seek review of a "holding" where "the basis of the decision below in fact was that the Act of Congress was unconstitutional * * *." *United States* v. *Raines*, *supra*, 362 U.S. at 20. The issues appellants seek to present to this Court are wholly peripheral to that question.[4]

It is established, of course, that if a proper appeal is taken to this Court under Section 1252, the Court then has jurisdiction of the "whole case" and may decide any issue in the case that is ripe for appellate review. *Fusari* v. *Steinberg*, 419 U.S. 379, 388 n.13 (1975);

[3]See also C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure* §4037 (1978).

[4]Appellants are incorrect in their assertion (J.S. 3 n.1) that plaintiffs' appeal in *Associated General Contractors of California* v. *Secretary of Commerce*, No. 77-1078 (July 3, 1978), gave this Court jurisdiction for its remand in that case. The Court's jurisdiction was based upon the Secretary's appeal (No. 77-1271) from a judgment that the statute was unconstitutional.

United States v. *Raines*, *supra*, 362 U.S. at 27 n.7. Thus, if this appeal were pendent to one challenging the holding that the MBE provision is unconstitutional, it would properly be before the Court. But since the Secretary has not docketed an appeal of the district court's constitutional holding, it cannot provide a predicate for appellant's direct appeal under Section 1252.

This appeal should therefore be dismissed for lack of jurisdiction.[5] In the event that the Court disagrees with this conclusion, then the judgment of the district court should be affirmed because, as we demonstrate below, appellants' claims are plainly insubstantial.

2. As to the federal parties in *Montana II*, appellants argue (J.S. 11-12) that the district court erred in denying their motion to amend the complaint to claim damages against Reginal Gant, a Civil Rights Specialist, for failure to grant a waiver of the MBE requirement for the White Sulphur Springs project. A district court has broad discretion to refuse to allow a party to amend its pleading after a responsive pleading has been served. See Fed. R. Civ. P. 15(a); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 330-331 (1971). The court properly denied the motion to amend in this case on the ground that appellants had not stated a claim for which monetary relief could be granted. As this Court held in *Butz* v. *Economou*,

[5]Appellants' appeal to this Court is understandable, since it was taken at a time when it appeared that the Secretary would be appealing the district court's holding of unconstitutionality under Section 1252. In these circumstances, the Court may deem it appropriate to vacate the judgment of the district court and to remand for the entry of a new judgment so that appellants may appeal to the United States Court of Appeals for the Ninth Circuit.

438 U.S. 478 (1978), a federal executive official may be held personally liable in damages only if he "knows or should know he is acting outside the law" 438 U.S. at 507-508.

Appellants' motion to amend did not allege that Gant had authority to grant a waiver of the MBE requirement, and in fact he did not.[6] Thus, a claim based on his failure to grant a waiver cannot state "a compensable claim for relief under the * * * Constitution" (*Butz* v. *Economou, supra,* 438 U.S. at 507).

Moreover, if appellants' claim is construed as one seeking damages for enforcement of the MBE requirement, it must also fail. There is no allegation that Gant, or any other defendant, was acting except in accordance with Section 103(f)(2).[7] Gant had no discretion to ignore the statutory requirement, and a federal offical may not be held liable in damages for exercising his duty to enforce an Act of Congress simply because that Act is subsequently held unconstitutional. See *Pierson* v. *Ray*, 386 U.S. 547, 557 (1967); cf. *Procunier* v. *Navarette,* 434 U.S. 555, 564-565 (1978). Such liability would attach only if the unconstitutionality is " 'clearly established.' " *Butz* v. *Economou, supra,* 438 U.S. at 498. That certainly

[6]Regional Directors of the Economic Development Administration may grant waivers. See page 4, *supra.* Gant is a subordinate of the Denver Regional Director.

[7]The motion to amend the complaint (J.S. App. 15a-16a) alleged that Gant was instrumental in denying Lockrem a waiver of the 10% minority requirement. If, in fact, Lockrem was summarily denied a waiver, the denial was required by the Act and its implementing regulations. The complaint demonstrates that the conditions for waiver (unavailability of qualified MBE's) were not present because the bidder who eventually got the contract met the requirements of the Act (J.S. App. 26a).

cannot be said of the statute here, since 11 district courts and three courts of appeals have upheld the constitutionality of the MBE provision.[8]

In sum, appellant's proposed amended complaint failed to allege that any federal official "discharge[d his] duties in a way that [was] known to [him] to violate the United States Constitution or in a manner that [he] should [have] know[n] transgresse[d] a clearly established constitutional rule." *Butz* v. *Economou, supra,* 438 U.S. at 507.[9]

3. Appellants also contend (J.S. 12) that this Court should hold that they are entitled to damges in *Montana I.* But no claim for damages was made in that case, and the complaint does not present any facts alleging specific, quantifiable injury upon which to base an award of damages. See pages 5-6, *supra.* Appellants' theory seems to be that simply because the district court declared the MBE provision unconstitutional, both federal and local officials should be required to pay damages. But they have offered no reason why

[8]See, *e.g., Constructors Association of Western Pennsylvania* v. *Kreps,* 573 F. 2d 811 (3d Cir. 1978); *Ohio Contractors Association* v. *Economic Development Administration,* 580 F. 2d 213 (6th Cir. 1978); *Fullilove* v. *Kreps,* 584 F. 2d 600 (2d Cir. 1978), cert. granted, No. 78-1007 (May 21, 1979). See also the cases cited in Memorandum for the United States in *Fullilove* v. *Kreps,* No. 78-1007, pages 8-9 n.3. In addition to the court below, two other district courts have held the statute unconstitutional. *Wright Farms Construction, Inc.* v. *Kreps,* 444 F. Supp. 1023 (D. Vt. 1977); *Associated General Constractors of California* v. *Secretary of Commerce,* 459 F. Supp. 766 (C.D. Cal. 1978), appeal docketed, No. 78-1107 (Jan. 15, 1979).

[9]Although this motion is made only on behalf of the federal appellees, the same principles would apply to appellants' damages claims against the local appellees. See *Wood* v. *Strickland,* 420 U.S. 308, 322 (1975).

this Court should make an exception to the general rule that the claims of a party may not be enlarged on appeal. *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976); *Singleton* v. *Wulff*, 428 U.S. 106, 110-121 (1976). Furthermore, for the reasons stated above, federal officials would be immune from damage liability under *Butz* v. *Economou*, *supra*.[10]

CONCLUSION

The appeal should be dismissed for lack of jurisdiction. In the alternative, the judgment of the district court should be affirmed to the extent that it denies damages to appellants.[11]

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

DREW S. DAYS, III
Assistant Attorney General

JESSICA DUNSAY SILVER
FRANK D. ALLEN, JR.
Attorneys

MAY 1979

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[10]Appellants' reliance on *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), is misplaced. The relief held appropriate in that case was not damages against a federal official for alleged violation of the constitution, but back pay against a private employer for violation of a statute that authorized such relief. As this Court explained, "one of the central purposes of Title VII [of the Civil Rights Act of 1964] is 'to make persons whole for injuries suffered on account of unlawful employment discrimination.' [Citation omitted.] To effectuate this 'make whole' objective, Congress in Section 706(g) vested broad *equitable* discretion in the federal courts to 'order such affirmative action as may be appropriate, which may include * * * *back pay* * * *.'" *Id.* at 763 (emphasis added).

[11]See note 5, *supra*.

Supreme Court, U. S.
FILED
JUN 11 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1546

MONTANA CONTRACTORS' ASSOCIATION, a Montana non-profit corporation; and LLOYD C. LOCKREM, INC., a Montana corporation, *Appellants,*

v.

THE SECRETARY OF COMMERCE OF THE UNITED STATES, THE MONTANA STATE DISTRICT OFFICER OF THE MONTANA ECONOMIC DEVELOPMENT ADMINISTRATION, and THE CITY OF KALISPELL, *Appellees.*

LLOYD C. LOCKREM, INC., a Montana corporation, *Appellant,*

v.

THE SECRETARY OF COMMERCE OF THE UNITED STATES, *et al, Appellees.*

On Appeal From the United States District Court for the District of Montana

REPLY BRIEF FOR PLAINTIFF-APPELLANTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1546

MONTANA CONTRACTORS' ASSOCIATION, a Montana non-profit corporation; and LLOYD C. LOCKREM, INC., a Montana corporation, *Appellants,*

v.

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The United States, Defendant-Appellee in No. 78-1546, in its Motion to Affirm or Dismiss argues that this Court lacks jurisdiction of appellants' appeal (Appellee's Motion to Dismiss or Affirm 6-9). This Court

has jurisdiction over this action under 28 U.S.C. § 1252. This statute (28 U.S.C. § 1252) clearly provides on its face that "any party" may appeal to the Supreme Court from an interlocutory or final judgment, decree, or order of any court in the United States holding an act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States is a party.[1] In 78-1546 appellants Montana Contractors Association and Lloyd C. Lockrem, Inc., plaintiffs in the district court, appealed the final judgment of the United States District Court for the District of Montana which found Sec. 103(f)(2), the Minority Business Enterprise requirements [MBE] of the Public Works Employment Act of 1977, [PWEA], Pub. L. No. 95-28, 91 Stat 117, 42 U.S.C. § 6705(f)(2), unconstitutional but denied plaintiffs any damages against local or federal defendants for violation of their constitutional rights.

There are no cases in which this Court has ruled that plaintiffs lack jurisdiction to bring a direct appeal under 28 U.S.C. 1252. The cases which are cited by the

[1] 28 U.S.C. 1252 provides:

> "Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court of record of Puerto Rico, holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.
>
> A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court.

federal appellee (Appellee's Motion to Dismiss or Affirm 8) as the basis for its assertion that the Court lacks jurisdiction over this appeal are clearly distinguishable from this case.[2] None of the cases cited by the federal appellee involved a decision in which a court found a statute unconstitutional on its face, as did the district court in this case. (J. S. App. 10a-13a). Appellants submit that under 28 U.S.C. 1252 this Court has jurisdiction of its appeal, which is based on a final judgment, in which the district court found a federal statute unconstitutional but denied appellants damages against federal or local appellees for violation of their constitutional rights.

Federal appellee's assertion that the issue of appellants' right to damages for constitutional violations is insubstantial, is clearly misguided. This Court's consideration of this issue in *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971); *Butz* v. *Economou,* 438 U.S. 478 (1978) and its recent decision in *Davis* v. *Passman,* 47 LW 4643 (June 5, 1979) clearly demonstrates that this Court does not regard this issue as insubstantial.[3]

[2] In *Norton* v. *Matthews,* 427 U.S. 524 (1976) (Appellee's Motion to Dismiss or Affirm 8), this Court found that it lacked jurisdiction under 28 U.S.C. § 1252 to review a holding that executive officers had applied an act of Congress in an unconstitutional manner. In *United States* v. *Christian Echoes National Ministry, Inc.,* 404 U.S. 561 (1972) (Appellee's Motion to Dismiss or Affirm 8), this Court found that it lacked jurisdiction under 28 U.S.C. § 1252 of an appeal from a holding construing an act of Congress so as to avoid its unconstitutionality.

[3] In *Bivens, supra* this Court held that a plaintiff may bring a damage action for violation of his Fourth Amendment rights. This holding was reaffirmed by the Court in *Butz* v. *Economou, supra.*

In *Davis* v. *Passman, supra* at 4644, this Court held that Plaintiff who had alleged a violation of her constitutional right to due process under the Fifth Amendment asserted a constitutionally protected right, stated a cause of action which asserts this right, and that relief in damages constituted an appropriate form of remedy. In No. 1546, the appellants sought damages in the district court for violation of their constitutional rights under the Fifth and Fourteenth Amendments. The court found that the MBE provisions of the PWEA denied appellants equal protection and therefore violated the Constitution. However, the court refused to consider damages against local or federal defendants. J. S. App. 13a, 14a, 20a-21a. In refusing to consider the damage claims, the district court erred as a matter of law, especially in the light of *Davis* v. *Passman* in which this Court clearly recognizes the right of plaintiff to seek relief in damages for violation of a constitutionally protected right under the Fifth Amendment.

Federal appellee also argues (Appellee's Motion to Dismiss or Affirm 9-10) that the standard of review for the district court's denial of appellant's motions in Montana II to amend its complaint to plead damages against federal appellees is an abuse of discretion and therefore renders the issue of whether appellants were entitled to plead and recover damages insubstantial. The district court's refusal to allow the appellant to amend their complaint was based on its determination that appellants did not have a right to seek damages. J. S. App. 14a. It was not based on discretionary factors, e.g. prejudice to other party, which a court considers under Rule 15(a) of the Federal Rules of Civil Procedure in determining whether to allow an amendment of a pleading. These facts are not disputed by federal appellee. (Appellee's Motion to Dismiss or Affirm 9). Thus, the substantial issue before this Court is whether the district court erred in refusing to recognize that appellants had a right to bring a damage claim against federal appellee and recover damages for violation of their constitutional rights.

Under ~~*Morrell*~~ MONNELL v. *Dept. of Social Services,* 436 U.S. 658 (1978), damages against local officials is an appropriate form of remedy for a constitutional violation. Appellants in Montana II pleaded damages against local appellees in their original complaint, but the court refused to consider damages against local appellees.[4] J. S. App. 22a-49a; 19a-21a, 13a.

Even if this Court were to decline to review the district court's failure to award damages against federal appellee as a result of its refusal to allow plaintiffs to amend their complaint to plead damages against such appellee, it would still be faced with the substantial question of whether the district court erred as a matter of law in refusing to consider whether appellants were entitled to damages against local appellees for violation of their constitutional rights.

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[4] Federal appellee argues with respect to the damage claims of plaintiffs in Montana I, (Appellee's Motion to Dismiss or Affirm 12) that the claims of a party may not be enlarged on appeal. Appellants submit that they have not enlarged their claims on appeal. In its complaint, appellants in Montana I requested general relief which would include damages. J. S. App. 60a.

For the foregoing reasons and the reasons set forth in its jurisdictional statement, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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